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become as evident to human understanding, as they are effential to human happiness.

Here then commences the obligation of civil laws: the impulses of appetite cease to be the sole motives of action; power is no longer the measure of property; and the natural herd is refined into a political government. Legislation is instituted; and the baneful excesses of the passions are subjected to various modifications of restraint. Magistracies are established; and the promulgation of punishments is extended to All, by the common consent of All, for the benefit of All.

And thus it is, that the fystem of civil liberty is established on the aggregate of those portions of natural liberty, which are given up by the constituent members of society. But it is not to be supposed, that this effect is instantaneous; I shall hereafter have occasion to shew, that the infancy of civilization is tedious, and its progress towards maturity subjected to many difficulties. The gratification of private resentment, and the pursuit of private satisfaction, are at first the fole objects of criminal process; and the offended party is his own avenger. It is long, before the felfish passions are softened into an habitual acquiescence in the general dispenfations of Law; before injuries to individuals are confidered, and made punishable, as injuries to the fociety at large. This change, in which the public interest is recognized to be the great end of penal jurisdiction, though founded in reason, is contradictory to the most active propensities of human nature, and therefore is submitted to with reluctance,

It is from this affumed period of improved civilization that I am now to proceed.

§ 2. To what extent the authority of legislative regulations may be carried, and how far the obedience of the subject is demandable, are questions of speculation, which the temperate disposition of modern governments hath rendered rather curious than useful. It is sufficient to observe, that every causeless or unnecessary restraint of the Will is an infringement of that political freedom, to which every member of fociety is entitled: and possible cases may certainly be proposed, which no authority on earth can justify.er ing collosing exputy. Pintench, the bundle, real-

DWUTS

ed seal an interior at the Board and the Asser Phalaris

Phalaris licet imperet, ut sis
Falsus, et admoto dictet perjuria tauro,
Summum crede nesas animam preserre pudori,
Et propter vitam vivendi perdere causas.

The accomplished Athenians enacted, that in sieges the aged and infirm should be put to death: an Englishman would not think himfelf compellable by any Law to plunge the poniard into the bosom of his helples Father. The same Athenians in the height of the most refined effeminacy considered the Expofition of their children as a practice justifia-Ble, and blameless; and Solon, the most celebrated of the Sages of Greece, gave to it the facred permission of law. Among the Spartans this unnatural species of murder was conducted by a, state-committee, appointed to determine, whether the child were proper to be reared, as likely to become useful to the community; or to be deferted, as of an infirm, and unpromifing constitution. Vain were the finites of innocence; and the cries of helpleffirefs: b Custom had murdered na-

a believed in the cold to telephon version

b The force of babitual prejudices is wonderful; a truth, which will frequently recur to the Reader in the course of the following enquiry. Plutarch, the humane, goodnatured Plutarch, recommends it as a virtue in Attalus, that he exposed all his own children, in order to leave the

tural affection; and the Babe was abandoned by its Parents to the Mercy of Wolves and The hearts of modern mothers bleed at the idea.

As to the more confined question, to what degree punishments may be carried; or how far a Man may subject himself, and his fellow-citizens to the infliction of pains, the loss of honors and property, the horrors of imprisonment, and the deprivation of life; the answer may in some measure be collected from those writings of Divine authority, to which I shall hereafter refer: At present it may be sufficient to appeal to the unwritten law of God imprinted on the heart of Man; to that natural sympathy better felt than expressed, which forbids us to give unnecessary

crown to the for of his brother Eumenes; fignalizing in this manner his gratitude and affection to Eumenes; who had left him his heir in preference to that for.

Perhaps (fays Mr. Hume) by an odd connection of causes, this barbarous custom might contribute to reader those times more populous. By removing the terrors of too numerous a family it would engage many people in marriage; and such is the force of natural affection, that very sew in comparison would have resolution enough, when it came to the point, to carry into execution their former intentions. China, where this practice still prevails, is the most populous country that we know. vails, is the most populous country that we know.

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Pain to each other; or, in fuller words, to extend the feverity of punishments beyond what is effentially necessary to the preservation and morality of society; general terms, of which a definition will result from the subsequent detail.

State-punishments are to be considered then as founded on, and limited by, first, natural Justice; secondly, public Utility: and it will be shewn, that, in the pursuit of those great ends, Wisdom and Mercy should go hand in hand.

law of God inprinced on the heart of Many

may be fufficient to appeal to the anyeitrens

of penal Laws. which to give unnecessary

THE prevention of crimes should be the great object of the Lawgiver; whose duty it is, to have a severe eye
upon the offence, but a merciful inclination
towards the offender. It is from an abuse of
language, that we apply the word "Punishment" to human institutions: Vengeance
belongeth not to mail. Criminals, said Plato,

Als. I e De Legibus, p 977.

are punished, not because they have offended; for what is done can never be undone; but that for the future the criminals themselves, and such as see their punishment, may take warning, and learn to shun the allurements of vice. "d Meti Susseti, inquit Tullus, si ipse discere posses speedera ac sidem servare, vivo tibi ea disciplina a me adhibita esset; nunc, quoriam tuum insanabile ingenium est. Tu tuo "supplicio doce bumanum genus ea santta credere, qua a te violata sunt." It is the end them of penal laws to deter, not to punish.

§ 2. But let not for this purpose the severity of the penalty be augmented in proportion to the increase of the temptation; which is a cruel and mistaken policy.

"Qui vi rapuit, fur improbrior videtur."
Such was the maxim of the Roman law, which punished the open, daring thief with whipping, and the pilferer by fine only. The English law, adopting a less equitable idea hath made it death to take privately from the pocket a handkerchief, or other thing of the value of twelve-pence; but any Larceny

at thought be connected as me. 8 c. 2 d. Hift. I. d. 2 28. m. d. 2 d. Hift. I. d. 2 28. m. de rot de

(below the degree of robbery by putting in fear) committed openly, and avowedly on the person, to any extent, and even in a dwellinghouse or out-house, under the value of forty fhillings, is s within the benefit of elergy. of view. " (Navi Suffell, belief) I what I was a

Under the same perversion of distributive justice it is made a only a transportable offence, " to affault another with an offensive weapon, or by menaces, demanding money, goods or chattels, with a felonious intent to rob!" whereas by another fature it is death without benefit of clergy, merely " to write an anonymous Letter, figned with a fictitious name, demanding money, venilon, or other valuable thing." which is a crued and mistalten paricy.

§ 3. The punishment should be proportioned to the flagitiousness of the crime; but the flagitiousness of the crime diminishes in proportion to the facility, with which it may be committed k: for that facility in general constitutes the degree of the temptation. were it death to take privately frem

By the flagiciousness of a crime, I mean its abilitact. nature and turpitude, in proportion to which the criminal should be considered as more or less dangerous to society. And furely, in the eye of the Lawgiver, who as a wolsd) a Cha Lingal De Springer of

Were I to leave the support of this position to the internal evidence of its own truth, or to the mere unaffifted dictates of moral fentiment, it might appear perhaps prefumptuous : because contradictory to the most ingenious and elegant writer on the law of England. of Jon Brisky

"" The severity of our law in certain inff ftances (fays that writer) feems to be ow-" ing to the eafe with which fuch offences are " committed." Again "-" It is but reason-" able, that, among crimes of equal maligni-"ty, those should be most severely punished, which a man has the most frequent, and eafy opportunities of committing; which cannot be to eafily guarded against as others: " and which therefore the offender has the "Itrongest inducement to commit: accord-

Man must make allowances for the imbecillities of man-kind, the abstract turpitude of the offence decreases in proportion to the inducements which naturally influence the mind of the offender.

C'est le tiomphe de la Liberté, lorsque les loix criminelles tirent chaque peine de la nature du crime : tout l'arbitraire cesse; la peine ne descend point du caprice du legislateur, mais de la nature de la chose; et ce n'est pas l'homme qui fait violence à l'homme.

L'Esprit des Loix, xii. 4.

1 See the Commentaries on the Laws of England,

p. iv. p. 241 noise labe and all roans side and I

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"ing to what Cicero observes, " ea funt " animadvertenda peccata maxime, que diffisillimit pracaventur." He then proceeds to feveral Examples, on which it may be fufficient to observe, that when " it is made capital for a servant to rob his master" in certain cases, which extend not to a stranger committing the same offence against indifferent persons; and, when " it is a species of treason for a servant to kill his master, or for a wife to kill her husband, which act in others is only murder;" we are not in those cases to suppose the frequent opportunities of perpetrating the offence to have excited the peculiar severity of the law o. The malignity of the fact is the true measure of the penalty; and that malignity is in these cases aggravated by the gross breach and flagrant abuse of domestic confidence P. Cicero has certainly said.

boup electionske allowers for the inherilling of conind, the abiliaci tarpitude of the obsence decreates a

n Orat. pro. Sexto Roscio, c. 40.

* Commune est boc malum, communis metus, commune periculum. Nulla funt occultiores insidia, quam ea qua latent in simulatione officis, aut in aliquo uccessivudinis nomine. Nameum, qui palam est adversarius, facile cavendo vitare possis. Hoc vero occultum, intestinum, ac domesticum malum, non modò non existit, verum estam opprimit, antequam prospiere atque explorare potueris. spicere atque explorare potueris.

Cic in Verrem, H. l. i. c. 15. q Upon this principle, by a declaration of Lewis the XVth, A.D. 1724, Le vol domestique fera puni de mort. This

quod ea funt animadvertenda peccata maxime, que difficillime precaventur: but the learned Commentator should have cited also the context, which supports the very principle for which I contend; ad cajus enim sidem ali"quis consuget, cum per ejus sidem leditur cui
"se commiserit? tecti esse ad alienos possumus;
"socium cavere qui possumus? quem etiam si
"metuimus, jus officii ledimus: Nam neque
"mandat quisquam sere nist amico: neque credis
"nist ei quem sidelem putat. Perditissimi est
"igitur bominis, simul et amicitiam dissolvere,
"et fallere eum qui lesus non esset, nist credi"disset."

§. 4. From these positions, "that the penalty ought to be increased in proportion to the outrage of the crime," and "not in proportion to the temptation which misleads the mind of the criminal;" I would by no means infer, "that the penal fanction relative to every particular offence should be mitigated in proportion to the facility with which that offence may be committed."

This was only the renewal of a very ancient Law made by Lewis the IXth, A. D. 1270, which confiders this offence as a species of treason. "Hone, quand il emble a son Saignour, et il est à son pain et à son vin, il est pendable; car c'est maniere de trabison." Code penal. 103.

Political

Political

Political wisdom is the result of experience, rather than of theory. And the history of every state will shew to us, that in some cases the emergencies of society make it expedient to place great severities in opposition to the strongest temptations; that in others it is necessary to punish the offence without any research into its motives; and that in every case it is impracticable for Lawgivers to assume the divine attribute of animadverting on the fact, only according to the internal malice of the intention.

The fafety of the Public is the supreme law of policy: and when Legislature is thus necessirated in any degree to deviate from the principles of justice and humanity, we must fubmit to the deviation merely as to an occalional refult from the imperfections of our nature. But the principles of justice and humanity are unchangeable: and to those principles I appeal, when I controvert the polition, " that among crimes of equal malignity, those should be most severely punished which the offender has the strongest "inducement to commit." A polition! which, if generally established, would lead to fanguinary and cruel confequences. 6 5. " That That Legislature may justify the infliction of whatever degree of severity is necessary for the prevention of any particular crime;" is also a position, which, when offered without limitation, I conceive to be both morally and politically false. It is a pretence, which, if once suffered to hurry us beyond the bounds of humanity, is subject to no other restraint.

ingennity of reacty to crade the law.

§ 6. When the rights of human nature are not respected, those of the citizen are gradually difregarded. Those æras are in hiftory found fatal to Liberty, in which cruel punishments predominate. Lenity should be the guardian of moderate governments : fei vere penalties, the instruments of despotism, may give a fudden check to temporary evils; but they have a tendency to extend themfelves to every class of crimes, and their frequency hardens the fentiment of the people. Une loi rigoureuse produit des crimes. The excess of the penalty flatters the imagination with the hope of impunity, and thus becomes an advocate with the offender for the perpetrating of the offence.

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The convicts, who have stolen cloth from the tenters, fustian from the bleaching ground, or a lamb from their landlord's patture, knew the law to have assigned death, without the benefit of clergy, to each of their offences: but, in the depth of ignorance and profligacy, mere instinct informed them, that common bumanity would recoil at the idea, and they relied for their security on the ingenuity of mercy to evade the law.

§ 7. Legislators should then remember, that the acerbity of justice deadens its execution; and that the increase of human corruptions proceeds, not from the moderation of punishments, but from the impunity of criminals.

S. When the rights of himse retire

§ 8. In the promulgation of every new offence, let the lawgiver expose himself to feel what wretches feel; and let him not seem to bear hardest on those crimes. which, in his elevated station, he is least likely to commit. "Si les supplices en usage dans presque tout l'orient font horreur à l'huma-

^{9 22} Car. II. c. 25. § 3. r 4 Geo. II. c. 16. and 18 Geo. II. c. 19. • De l'Esprit, t. ii. p. 68.

" nité, c'est que le Déspote, qui les ordonne,

se sent au dessus des loix. Il n'en est pas

ainsi dans les republiques; les loix sont tou
jours douces, parce que celui qui les établit,

s'y soumet." If this reasoning be founded
in truth, it furnishes a mortifying inference,
that men are naturally cruel, when they can
be so with safety.

§ 9. Penal laws are to check the arm of wickedness; but not to wage war with the natural sentiments of the heart.

et det menchorn infant, is permetent in direct dets. Phete

child-led linen, or coher

are caracives in her to

Contrary to this principle is the fature, which, making the concealment of infamy evidence

and farring enhancements of colonies distant

t 21 James I. c. 27. which recites, "That women, delivered of bastard children, to avoid their shame, and to escape punishment, do secretly bury, and conceal the death of their children, alledging, if the child or children be afterwards found, that they were born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said children were murthered by the said women." For the prevention of this mischief, it is hereby enacted, "That in every case the said mother so offending shall suffer death as in case of murder, except such mother can make proof by one witness at the least, that the child, whose death was by her so intended to be concealed, was born dead."

The modern exposition of this statute is a good instance, that cruel laws bave a natural tendency to their own dissolution in the abborrence of mankind. It is now the constant practice of the courts to require, that the body of evidence of murder, compels unhappy wormen to break through the becoming pride and modesty of their sex, and to be the first officious publishers of their own shame. Harsh is the construction of treasons ", which subjects

the child shall be found, before any conviction can take place; and, if it should happen, that the mother had any child-bed linen, or other preparatives in her possession, prior to her delivery, it is generally admitted as a proof, that no conceasement was intended. Moreover, it is not unusual to require some degree of evidence that the child was actually born alive, before the ungenerous presumption, that the mother was the wilful author of the death of her new-born infant, is permitted to affect her. These humane deviations from the harsh injunction of the statute have nearly amounted to a tacit abrogation of it.

tute have nearly amounted to a tacit abrogation of it.

The expressions of the Swedish Law on this subject are very severe—" Mulier impudica, que ex illegitimo coscubitu uterum gestat, nec hoc ante partum aperit, latebras querens quo surtim enitatur partum, et deinde abscondit, percutiatur securi, et in pegmate comburatur, non attente pratextu mertuum vel ante justum terminum editum suisse."

There is a law to the same purport in France; which may also be found in the "Observations on the ancient statutes," p. 425; and I find that it is strictly enjoined by an ordinance of Henry III. and by a declaration of Lewis XIV. to be published once in every three months in all the parish churches.

Code penal. Paris, 1755, 8vo. titre 29.

v A. D. 1689, Lady Lisse and Mrs. Gaunt were convicted of high treason, and executed: the former for harbouring a dissenting priest, who had been concerned in the Duke of Monmouth's rebellion; the latter for giving refuge to another rebel, on whose evidence, voluntarily offered, the conviction was grounded. The man was pardoned

jects to that fentence full of horrors the fon, hufband, and father, for the prosection given to the wife, parent, and child. long with the

ruption of blood; which is faved a by foceial

The laws of Japan oblige the person accurate to give an answer to the accuration; if his answer be false, he is punished with death. This is a violation of the first principle of felse preservation, more of death as it is the result.

fections of legislatures, that they are necessitated to assign the same name and penalty to whole classes of crimes, each of which differs from the other by an infinite variety of unsearchable circumstances. Yet some offences are so intimately, and so undistinguishably classed in their nature, that it is difficult to conceive any possible reason for a diversity in their punishment.

doned for his treachery; the was burned blive for her charity.

I make no observations on their respective trials; because the proceedings of our criminal courts, at this zera, are so disgraceful, hot only to the nation, but to human nature, that, as they cannot be disbelieved, I wish them to be buried in oblivion.

See Humes's Hift, vi. 385.—Burnet, i. 649.

Ca t ge a Il agros ducit It

2 ac Geo. 11, c. 50

It feems a strange incongruity, that the offence of counterfeiting foreign coin legitimated by proclamation, should work wa corruption of blood; which is faved v by special proviso in the offence of counterfeiting the current coin of the kingdom. Again, it is a clergyable felony by our law to destroy or damage the bridges of Brentford or Blackfriars: but it is death to commit the fame offence on the bridges of London, Westminster, or Putney. There is a similar unaccountable diffinction between prison-breakers convicted of y perjury, or committed for entering black-lead mines with intent to fleal and fuch as are convicted of, or committed for any other offence within clergy. God forbid that I should infinuate a necessity to drag all this variety of discordant instances to the fame bloody line of uniformity! Their cruelty appears to me equal to their inconfiftency; and it would not perhaps be difficult to prove their folly equal to their cruelty.

§ 11. Laws made on the four of the occasion, should have a short and limited dura-

2 25 Geo. Il. c. 10

^{1 7 2} George II. c. 25 § 20

tion; otherwise in the course of years it will be faid, "magis suculum fuum sapium, quam redam rationem." one inches sirationes but

It is still a Felony to steal a hawk, and death to affociate one month with Egyptians, or to wander, being a foldier or mariner b, without a testimonial under the hand of a justice reinsten to morning ald not

§ 12. Obsolete and useless statutes should be repealed; for they debilitate the authority of fuch as still exist and are necessary. Neglect on this point is well compared by Lord Bacon to the cruelty of Mezentius, who left the living to perish in the arms of the dead.

Persons carrying subjects out of the northern counties, or giving black mail for protection, Jailers forcing prisoners to become approvers d, Masons confederating to prevent the statutes of labourers e, Purveyors in certain cases

devoit the Legillaros (Salcertain them,

^{2 5} Eliz. c. 20. p. 23. See the declaration of Lewis XIV. contre les Bohemiens, et ceux qui leur donnent retraite.

Code penal. p. 114

39 Eliz. c. 17.0 c. vi e. 43 Eliz. c. 13. c. vi e. 41 Eliz. c. 14. c. vi e. 41 Eliz. c. v

though purveyance is abolished, are all capital offenders: and none shall bring pollardz and crockardz (which were foreign coins of base metal) into the realm, on pain of forfeiture of life and goods s. The alterations in our government have rendered these particular provisions totally ineffective; but there are other obsolete statutes, which exist, the possible instruments of mischief in the hand of tyranny.

§ 13. Civil and criminal laws must accumulate, and become complicated, in proportion to the increased riches of the state. and to the fecurity given to the liberties, lives, honours, and properties of the people. Defpotic states admit a fimplicity of legislation, the forms and principles of which depend on the caprices of a weak and ignorant Monarch, whose breast is the repository of precedents: but it should be the primary object of free governments, to have the outlines of their privileges fixed and derminate. When the laws for this purpose are explicit, it is the duty of the Judge ftrictly to conform to them; when they are otherwise, it is the immediate duty of the Legislator to ascertain them.

Fabrica &

It is not therefore fufficient, that the decision of the fact be guarded from the influence of fear and affection in the adjudication of the law should be a certain consequence of that decision. Bus, when the penalty preferibed bears an evident and excessive disproportion to the offence, the humanity of the Judges will be interested in the evalion of it. u et magis valebunt acumina ingeniorum, quam auctoritas legis h." And this is a consideration, which, exclusive of every motive of humanity, should induce the lawgiver carefully to discuss the different modes of punishment as applicable to the different degrees of moral and political guilt. C H A P. III.

Of the Infliction of Death. § 1. T is impossible to read the histories of executive justice in different governments without shuddering at the very idea of those miseries, which men, with unrelenting ingenuity, have devised for each h Bac, de Augm. Scienc.

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C 3 other.

other. In some countries it hath been usual to sow up criminals in the warm skins of beasts, and in this condition to expose them to wild dogs: in others the limbs are torn as under by horses; in others recourse is had to crucifixions, burnings, boilings, slayings, famishings, impalements, and other modes of destruction, equally shocking to deceney and humanity.

tion, which effectful Heaven to thick of

- "Thou rather with thy therp and fulphurous bolt armen
- "Split's the unwedgable and gnarled oak all or eller
- " Than the foft myrtle : O but man, proud man,

" Dreft in a little brief authority,

- " (Most ignorant of what he's most affured, "Orn to
- " His glaffy effence) like an angry ape,
- " Plays such fantastic tricks before high heaven
- " As make the angels weep i."

§ 12. This imputation of tyranny and cruelty hath at different periods been applicable to every government, of which we have any authentic history. Livy, in respect to his countrymen, hath endeavoured to establish a different inference in his account of the punishment of Merius Sussetius k; "Exinde, "duabus admotis quadrigis," in currus earum

Shakespeare, Meas. for Meas. k L.i. c. 28.

" At L en Am In Them

s distentus illigatur Metius ; deinde in diversum "iter equi concitati, lacerum in utroque curru es corpus, qua inbeferant vinculis membra, pori tantes. Avertere omnes a tanta faditate " fpestaculi oculos. Primum, ultimumque illud " supplicium apud Romanos exempli parum me-"moris legum bumanarum suit, in alis gloriari " licet, nulli gentium mitieres placuisse panas." We know that national benevolence ought to be the concomitant of national liberty, and are therefore inclinable to give credit to this affertion; but it will not be found in any degree reconcileable to the united refilmony of many other Historians. The modes of capital punishment, used by the Romans, were at least as numerous, and as exceptionable. as those of other nations. The head of the malefactor was in some cases fastened within the furea, and in this article he was whipped to death; and this was diftinguished by the pame of m supplicium more majorum. In other

unes Less ducenti Ben 1 C. C. Caligula curatorem munerum ac venationum per continuos dies in conspectu suo catomis verberatum, non prius

continuos dies in conspectu suo catomis ververaium, non pripsoccidit, quam offensus putrefacti cerebri odore.

Sueton in vita Calig. c. 27.

m Codicilios praripuit Nero, legitque se bostem a senatu judicatum, et quaeri ut puniatur more mojorum: interrogavitque quale esset id genus poenas. Et cum comperisset, nudi hominis cervicem inseri surca, corpus virgis ad necem cadi; conterritus servum jugulo adegit.

Sueton, in vita Neron, c. 49.

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cases, as in the execution of Antigonus, the whipping terminated in beheading ". Crucifixion, or the favoile supplicium, was in use during many centuries, and first abrogated by Constantine; the sentence also inflicted whipping, "verbera intra aut extra pomerium, arbore infalici suspendito "." The criminal was naked in the execution of these different punishments. Parricides p were sewed up in a leathern fack, with an ape, a cock, a ferpent and a dog, and fo cast into the sea. It was also usual to cover some offenders with a mantle dawhed over with pitch, and then to fet fire to it; Gogita, inquit Seneca 9, illam tunicam alimentis igneis illatam et intextam. The Emperors introduced a punishment called " Serra-diffectio"." Damnatio in gladium, or fentence to the public combats, and damnatio ad bestias , were all frequent; and the latter appears to have been very fatal to offenders; "praclara adilitas! faid Cicero. unus Leo, ducenti Bestiardii." I.C. C. Califula enforces mannerum as vienas

commence dear on conference for concess worder as

n Dion. l. xlix.

o Liv. l. i. & Val. Max. l, i. c. Zi

P. Cujus supplicio non debuit una parari
Simia, nec serpens unus, nec culeus unus. Juv. I. viili.
See also, Dig. 48. ad Leg. Pomp. & Cic. Orat. pro-Sext. Roscio.

Sueton. in vita Calig. C. 27.

Dig. 48. 19. 11. 3. nous d'ann at gornes

These cruelties were founded on the twelve tables of the Decemvirs, and were contrary to the republican spirit. Accordingly by the Porcian law, made in the 454th year of Rome, by Porcius Lecca the Tribune, it was ordained, that no Citizen should be put to death. This exemption was in the extreme of lenity, and erroneous in its foundation. Capital executions are in all states necessary.

§. 3. Nothing, however, but the evident refult of absolute necessity, can authorize the destruction of mankind by the hand of man.

the its his own incress; but suffered than when

The infliction of Death is not therefore to be confidered, in any instance, as a mode of punishment, but merely as our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with the public safety.

§. 4. We may pronounce it then contrary both to fentiment and morality, to aggravate capital executions by any circumstances of terror or pain beyond the sufferings inseparable from a violent death.

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The punishment of the murderer after trial and conviction was by the Athenians left to the relations of the deceased, who might put him to death if they thought proper; but they were not permitted to use any degree of torture, or to extort money; Excellent restrictions! which taught the prosecutor to seek justice, not revenge; in wrath to remember mercy; and to seel less, what he in his own interests had suffered, than what the Offender was about to suffer.

It was a custom among the Jews to give wine mingled with myrrh to the malefactor at the time of his execution; in order, as it is faid, to cause a stupor, and deaden the sensibility of the pain.

relate of soften services, car authorize the

I transcribe the following passage from the English State-trials. "Hugh Peters, being carried on a sledge to the scaffold, was made

Demosthenes hath given a full explanation of this law, which ordered the murderer, if put to death, to be executed in the district or parish of the deceased; " on the murdered warnote: " sequitar in lege homamora h put to quit but works significatur, non licere slagris cadere homistidiam, vincire, laniare, lacerare ora, manus, populari tempora raptis auribus, &c." Pet. Leg. Att. p. 611. Demosth. Orat. adv. Aristoc. p. 410.

to fit thereon within the rails, to behold the execution of Mr. Cook. When Mr. Cook was cut down, and brought to be quartered, Col. Turner ordered the Sheriff's men to bring Mr. Peters near, that be might fee it, and bye and bye the hangman came to him all befrieared in blood, and rubbing his bloody hands together, he tauntingly afted, "Come how do you like this work, Mr. Peters? how do you like it?" He replied, "Friend, you do not well to trample on a dying Man."

Shall we plant thorns in the path of Mifery? God forbid! Such refinements of inhumanity are admissible only in governments fo abominable in their Constitution, as to make the mere loss of life desirable.

v This is not the only inflance of ungenerous infults towards the Republican fufferers at the Refloration. The Regicides (fays Bishop Burnet) had at that time been odious beyond expression, yet the odiousness of the crime began to be nuch flattened by the frequest executions. And therefore when Sir Henry Vane was brought to the Scaffold; lest his words should leave impressions on

And therefore when Sir Henry Vane was brought to the Scaffold; left his words frould leave imprefions on the hearers to the difadvantage of the government, drummers were placed under the Scaffold, who, as foon as he began to address the people, upon a fign given, struck up with their drums. After heing thus repeatedly interrupted, and even when he was taking leave of his friends, "he gave over and died with so much composedness, that it was generally thought, that the Government had lost more than it gained by his death." Vol. i. p. 164.

Store

6. 5. So-

§, 5. Solemnity indeed is requisite, for the fake of example; but let not death be drawn into "lingering sufferance;" detain not the exeruciated soul upon the verge of eternity. It was consistent only with the brutal infanity of Caligula to order the executioner to protract the death of the mangled criminal, perpetue, notoque jam pracepte, "Ita sieri, ut se mori sentiat."

§. 6. Lawgivers should remember, that they are, mediately, and in effect, the executioners of every fellow-citizen, who suffers death in confequence of any penal statute; and there are certain contrasted points of view, in which it may be of use to them to consider criminals at the approach of death.

"w Master Barnardine, what hoa! your friend the hangman! you must be so good, "Sir, to rise, and be put to death: Pray, "Master Barnardine, awake, till you are ex"ecuted, and sleep afterwards."

The wretch, to whom this last summons is so ludicrously addressed, is represented to us, "as a man, that apprehends death no

w Shakespeare, Meaf. for Meaf. Act, iv. Sc. 3.

more dreadfully, but as a drunken dream; careless, reckless, and fearless of what's past, prefent, or to come.

The crimes of fuch a man may perhaps have made him unfit to live; but he is certainly unfit to die. The fafety of the community, and the prefervation of individuals, may call for his execution; but the bosom of humanity will heave in agony at the idea, the eye of religion will turn with horror from the Spectacle moder worten and his allum aup " "retents conserve, materiam altem como eje

Suppose the fulferer on the contrary to have been a valuable member of fociety, and to have erred only from fome momentary impulse of our imperfect nature; one, who in the recollection of reason hath found repentance, who religns with chearfulness that life, which is become a forfeiture to the law. and looks up in confidence to heaven for that forgiveness which is not to be found on earth. The last footsteps of such a man, are watered with the tears of his fellow-citizens; and we hear from the mouth of every spectator,

[&]quot;Yes, I do think, that you might pardon him,

[&]quot;And neither heaven, nor man grieve at the mercy."

And the C H A P IV.

Of Banishment. To making

S. THE Romans permitted an accused Citizen, in every case before judgement to withdraw himself from the consequences of conviction into voluntary exile.

"Exilium (inquit Cicero) 7 non supplicium

"est, sed perfugium, portusque supplicii. Ita
"que nulla in lege nostra reperietur, ut apud

"cateras civitates, malescium ullum exilio esse

"multatum. Sed cum bomines vincula, neces,

"ignominiasque vitant, qua sunt legibus consti
"tuta; consugiunt, quasi ad aram, in exilium;

"qui, si in civitate legis vim subire vellent, non

"prius civitatem, quam vitam amitterent. Quia

"nolunt, non adimitur in bis civitas; sed ab bis

"relinquitur atque deponitur."

§. 2. Transportation 2 was totally unknown to the common law of England; but the antient

and we have from the inquent of every 'political,

and looks up in complement to beaven for that

y Orat. pro A. Czcin. c. 34.

² We may eafily form a probable guess as to its first introduction into our laws; for by stat. 39 Eliz. c. 4. it was enacted, "that dangerous rogues, and such as will not be reformed of their roguish course of life, may lawfully

tient practice of abjuration of the realsh bore a strong resemblance to the Roman institution. "This was permitted, says Sir E. Coke, "when the felon chose rather, perdere pa-"triam, quam vitam." The oath of perpe-

for the privilence of fanchuary

fully by the Juffices in their Quarter-leffions be banished out of the realm and all other the dominions thereof, into such parts beyond the seas as shall be for that purpose assigned by the Privy-Council: or otherwise be adjudged perpetually to the Gallier of this Realm." And surther every rogue so banished, and returning without licence, was made guilty of felopy, but within the benefit of Clergy. And for the better indemnifying of such rogues so returning, it was also enacted that prior to their banishment they should be "thoroughly burned upon the left shoulder with a hot burning iron of the breadth of an English stilling, with a great Roman R upon the iron, for a perpetual mark upon such rogue during his or her life."

See Rastall's Statutes, p. 429.

But Transportation more nearly as now practifed seems to have taken place about the time of the Restoration. For, saith L. C. J. Kelyng, p. 45, "Copeland (the prisoner) alledged, that he had done nothing but what he ought to do to serve his friend; and this favourable circumstance was allowed to be put into the King's pardon, amongst those prisoners of that nature who were to be sent beyond the sea; it baving been lately used, that for selonies within clergy, if the prisoner desire it, not to give his book, but procure a conditional pardon from the King, and send him beyond sea to serve sive years in some of the king's plantations, and then to have land there assigned to him, according to the use in those plantations for servants after their time expired; with a condition in the pardon to be void if they do not go, or if they return into England during seven years, or after without the King's Licence."

milding

tual banishment was then administered to him by the Coroner in the church, or churchyard, to which he had fled; and a cross was delivered into his hand for his protection on his journey. This custom no longer sublists; for the privileges of fanctuary being taken away by the act of Ja. I. the abjuration, as at the common law, being founded thereon, was virtually abolifhed . - viril and vi brights alog

judged no personic so the Califor of tests Radius." And the entered service to deputable, and extensions workens the § 3. At prefent, banishment is in Eng-'land, as in Ruffia 2, more frequently inflicted as a mode of punishment, than permitted as an act of mercy. But in Ruffia it is made fubfervient to political utility, and those, who have by their misconduct lost all claim to the indulgence of their countrymen, are compelled to undergo a separation from all domestic connections, the rigours of a horrid climate, and the unhealthiness of mines, in

2 A very particular description of fanctuary and abjuration may belfound in " Le Grand Couffumier," fin 9:

the or reformed at the a regular course or Nic. may been

^{§ 81.} See also the Mirror, c. 10513.

L'exilen Siberie porte avec soi une sorte de reprobation; il rend un homme si malheareux, que quoiqu'il tive au milien de ses semblables, tout le monde le fait ; perfonne n'ofe avoir avec lui ancune espece de liaison; mais c'est moins a cause du crime qu'on lui suppose, que par la crainte qu'on a du despôte.

Voyages en Sib. t. i. p. 236.

the place of better oitizing, who house otherwife be necessarily to accept to fevere a let.

On the contrary, levery effects of banishment, as practified in England; in laten betericial to the estiminal, and always injurious to the community. The kingdom is depicted of a subject, and renounces all the smooth ments of his fucure existence. How merely transferred to a new country of distant indeed, but as fertile, as happy, as obvitaed, and in general as healthy has ther which the hath offended, side not always require and and

punishment should be afferted in forme his stanges to have operated even as a temptation to the offence; in many instances hath its insufficiency been a fatal argument for the multiplication of capital penalties:

confideration, how far, and by what means, this defect in our lies may be redrested. It might perhaps be practicable to direct the finist employment of a limited number of convicted felons in each of the dock-yards, in the flamaries, filtworks, names, and public buildings

buildings of the kingdom. The more enormous offenders might be fent to Tunis, Algiers, and other Mahometan ports, for the redemption of Christian flaves : others might be compelled to dangerous expeditions; or be fent to establish new colonies, factories, and fettlements on the coafts of Africa; and on fmall islands for the benefit of navigation. It must however be confessed, that it is not easy to determine upon theory the success of political innovations; it is indeed impossible for a speculative writer in his closer to collect the proper materials for this purpose. Practicable schemes on such subjects can only be obtained from merchants and others, who are qualified by experience to point them out and have the inducement of interest to promote their fuccess vinam no possible of the

§ 5. I cannot dismiss this subject without expressing a doubt, relative to the propriety of punishing with death a return from transportations especially where the original offence was not capital. It certainly is not justified by necessity; for it is easy, if requisite to send the delinquent abroad again, without any considerable degree either of expence or trouble. Will it be said, that he deservedly

back, which he is supposed to have made? In many instances the transportation is not in the nature of a conditional partion, but threated by positive law in in no instance is

b In support of this affertion I shall cite some authorities; previously observing, that "exclusion from society is the proper punishment of those only, who are become objects of terror to their fellow citizens in consequence of very heinous crimes, either not equivalent to the altimum supplicium, or of which they have been convicted by disputable and unsatisfactory evidence."

By 6 Geo. I. c. 23, and 4 Geo. I. c. 11, any persons convicted of larceny either grand or petit, and entitled to clergy, may in the discretion of the court be directed to be transported to America for seven years; and if they return within that time, it shall be follow without benefit of clergy:

By flat. 10 Geo. 17. c. 32. the penalty of transportation for feven years is inflicted on the second offence of stealing deer in any uninclosed forest; and for the first offence upon such as come to hunt there, armed with offensive weapons.

By 26 Geo. II. c. 19. § 11. persons convicted of affaulting any magintaite or officer, &c. in the salvage of any vessel or goods, are to be transported for seven years.

lbid. c. 33. § 8. persons convicted of solemnizing matrimony without banns or licence; &c. shall be transported for sources years.

Also, by 5 Geo. 111. c. 14s persons stealing or taking fish in any water within a park, paddock, orchard or yard, and the receivers, aiders, and abettors shall be transported for seven years.

I have not selected these as the mest exceptionable infrances; there are many others, in which transportation is inflicted upon offences by no means so he nous in their hature, as to require the extirpation of the criminal from the society of his fellow-citizens:

dated "

fuch a compact reconcileable to the law of nature, by all of the law of

On the whole, is not fuch severity inconsistent with that leading principle, which sorbids penal laws to attack the natural sentiments of the heart? "Duri est non desiderare "patriam. Cari funt parentes, cari liberi, "propinqui, familiares; sed omnes omnium cari-"tates patria una complexa est: pro qui quit "bonus dubitet mortem oppetere?"

§ 6. By stat. 20 Geo. II. c. 46. it is made a felony, without benefit of elergy, for rebels under sentence of transportation to go into France or Spain; and the same severity is extended to all the friends of such persons, keeping or entertaining any correspondence with them by letters, messages, or otherwise.

In the wording of this clause, there is not any faving of even the most innocent interchanges of friendship. Shall then the law-giver infringe all the ties and privileges of humanity? Shall he point the sword of justice against the bosom of fidelity? To such a lawgiver I would say, "Consult your own "heart,

" heart, and inflict not chaftilement on actions, which a good mind cannot difapstopping all the conclusions for "layore".

to ably concended we male at leaft collect,

that the law of forfeitures, when properly. directed and Vicing Red Ais Haid terroi

Of Forfeiture and Corruption of Blood.

in delence of the flate neither cruel not

S. I. NEC vero me fugit, quam sit querbum. imir parentum scelera filiprum panis lui : sed hos practare legibus comparatum est, ut caritas liberorum amicitiores parentes respublico red "friendship, interest, or nature ?" d 2850

On a superficial glance, it seems harsh in a moral view, to extend the different and infamy of the guilty ancestor to the innocent descendant, and to involve a whole family in the punishment of one criminal; In a political light, it feems contrary to the principles of freedom, to institute irregular suctuations of property, and to leave fo baneful a tool to the milipplication of possible tyrannya or the rage of civil troubles A very ingenious answer hath been given to Cic. ad Brutum, Ep. zii. and Tool of Tool

bus

these objections by a late learned person a from whose excellent argument (without adopting all the conclusions for which he so ably contended) we must at least collect, that the law of forfeitures, when properly directed and restrained, is a salutary terror in defence of the state, neither cruel non impolitic.

Was it ever alledged against the punishment of death, that "its consequences can"not in any case be confined to the crimi"nal; but must of necessity go beyond
"him, to some connected with him by
"friendship, interest, or nature?" "

ciety is supported by this necessity, whilst
individuals suffer by it. Omne magnum exemplum habet aliquid ex mique, quod contra sugulos utilitate publica rependitur

But it will be fald, that the collateral confequences of forfeiture are not the creatures of hecessity, but of positive institution. Be they so, it is neither unjust nor unwile to equiver human partialities to the promotion of human happiness. Descendible honours,

d Confid. on the Law of Forfeiture, p. 10.

e Tacit. Annal. L xiv. munera be 300 -

gifts of fociety, conditional gifts, and therefore revocable, and may be modified by the public diference for the public benefit.

fence only of forfeitures immediately affect, ing the criminal; and it may feem a fufficient feverity, that the children are thereby reduced to prefent poverty. It is not fo easy to reconcile either to reason or henevolence, that corruption of blood, a further consequence of English attainders, by which the inherit, able quality is for eyer extinguished.

The grandfather pollelles an estate in fee; his fon commits treason, and is executed; this attainder is a never-ceasing bar to the claim of the grandchild, and his posterity. A father feifed of an estate in fee dies, leaving two fons the elder of whom is attainted; the younger cannot succeed, though the immediate descendent of innocent ancestors: nor can the children of the elder. Why, it will be faid, should the impediment of blood stop the course of descent as to estates, over which, the criminal, as he never had any poffession, could have no influence? It is an ob-D 4 to vious

vious answer, that the law requires the claimant by descent to prove himself heir to the person last leised; and in these cases a link of the descending chain is irrecoverably lost.

We must not however argue from special cases against general systems. Perfection unexceptionable cannot be the result of human dispensations; and it would turn this beautiful fabric of our liberties to a fantastical, confused some of preposterous distinctions, if it were allowable to set up personal compassion, and private hardships, in opposition to the consistency of legal principles.

difficult for the artificial inferences of reason to give satisfaction to the natural dictates of sentiment.—A criminal is attainted, in the year 1770, for an offence, then only discovered, but committed in the year 1760.—Suppose him, in this interval, to have alienated one half of his estate to a fair purchaser, and to have contracted bond side debts, equivalent to the other half. The Aliente must be dispossessed, and the honest creditors are lest without remedy; for the soffence of lands (says the law) has a relation to the time

of committing the offence, so as to avoid the intermediate charges and convey-

Again, if the Husband and Wife be possible felled jointly of a term of years in land, and the husband drown himself, the land shall be forfeited to the King; and the wife must lose the benefit of the survivorship. For, by the act of casting himself into the water, which is the cause of the felony committed, he forfeits the term; and this gives a title to the King, in preference to the wife's title by survivorship, which could not accrue till the instant of her husband's death.

Many of the inferior felonies subject the offender to the forfeiture of goods and chattels only; whence results a very unequal distribution of justice: A rich trader, and an affluent country-gentleman, being involved precisely in the same species and degree of guilt, the children of the former are reduced to beggary, while the family of the latter retain all their opulence.

Blackst. Comment. iv. 190. Plowden 250. This was determined in the case of Lady Margaret Heles, wife of Sir James Hales (one of the Judges of the Common Pleas) who drowned himself in the third year of Q. Eliz.

The death of the ancestor, before conviction and judgment, discharges, as to the real estate, all proceedings and forseitures. So that the law surnishes a temptation to the Criminal to rush uncalled for into the presence of the Almighty, with all his imperfections on this head, and the addition of Suscide to the catalogue of his offences.

Valerius Maximus gives us an example of the effect of a temptation of the fame kind. He tells us, that Licinius Macer, at the conclusion of his trial, perceiving Cicero ready to give judgment against him, stopped his breath with a handkerchief, and expired, and that the estate was thereby saved to his son Licinius Calvus, afterwards an Orator of great eminence. In the latter ages of the Roman law, a distinction was made, inflicting forfeiture on those who killed themselves under the acculation of a capratal crime.

§ 4. Bills of attainder may with propriety be mentioned under the title of this chapter: they are exertions of those extraordinary legislative powers, which ought to be used

Sid O to 18 Val. Max. ix. 12.

The

only on the pressures of real and urgent necessity; but never to be desecrated to the gratification of political resentments.

One of Henry the Eighth's parliaments at tainted the Countels of Salifbury, the Marchionels of Exeter, and two Gentlemen, without any trial or even citation to appear, and without better proofs, than the unsupported suggestions of the wretched sycophant Cromwell. This instrument of regal tyranny fell a sacrifice to the same iniquitous measures himself. He was in the year following declared Vicar-general of the kingdom; and, a few weeks afterwards, under an attainder of the same parliament, without trial, examination or evidence, condemned to death, and executed h.

It is impossible to apologize for the many bloody stains, which we find indesibly affixed upon English history, by this passionate and irregular mode of punishing. Even Strafford, whom, as an English stateman, we may, as Englishmen, abhor, must in candour be confessed to have fallen a victim to the indiscreet rage of an English parliament. "We have

h Burnet, vol. i. p. 278.

"lived, my lords, (faid he at the conclusion of his eloquent defence) happily to our felves at home: we have lived gloriously abroad to the world: let us be content with what our fathers have left us: let not our ambition carry us to be more learned, than they were, in killing, and destructive arts. Were it not for the interest of these pledges, which a Saint, in heaven left me, I should be loth—
(here he pointed to his children, his voice faultered, and his weeping stopped him) what I forfeit for myself, it is nothing: but, I confess, that my indiscretion should forfeit for them, it wounds me very deeply. You will pardon my infirmity: something more I should have said; but I see I shall mot be able, and therefore I shall leave it."

"Such (fays the philosophical Historian) were the capacity, genius, and presence of mind, displayed by this magnanimous states man, that whilst argument, and reason, and law had any place, he obtained an undisputed victory: and he perished at last overwhelmed and still unsubdued, by the undisguised violence

bluract, vol. is at 178.

only

bevil is

lence of his fierce and unrelenting intagohills." Weak is the effect of elequence on the predeterminations of party! The parliament proceeded in the attainder; but in a few weeks remitted to the children the more fevere confequences of the fencence?

i The following note, which was copied from the Lord Primate Uther's Almanack, furnishes matter for such reflection.

" May 11, 1641.

The King wishes me to deliver unto my Lord Strafforde to-morrow,

1. That if the King's own life were only hezarded thereby, he would never have given passage unto his death.

2. That the Execution without exercam danger cuines be

2. That he was moved by the Lords for his wife and children, and intended to dispose his entire estate upon them.

a. That, if his fon be capable, he will take special notice of him for his imployment and preferment, (which I must tell mone but him.)

5. That for Lord Chancellor Lowther and Derry, he flops the proceedings until they give good reason for their authority.

6. L. Dillon's ability above all the natives.

7. Earle of Orward fall be Knight of the Chreer in bis place.

8. Carpenter to be at liberty to look to his estate, on any one whom he shall appoint to have care of his children.

May 12. The Lord Strafforde beheaded at Tower-

breaking to the Lant of Formation

and?

See the Strafforde Letters, vol. ii. p 418.

That,

That, "whoever deserves to die, and dies if an all of the whole Legislature, dies justly," is a position, which in the construction of unprejudiced reason is certainly true: but it should be remembered, that many requisites must concur to shew, that the party prosecuted deserves to die; requisites, which, in most cases of attainders, have been too precipitately assumed. But I return to my subaject.

§ 5. Upon the whole, though it be not unequitable; "that those contingent advantages, which the civil qualifications of the blood have brought into view by the defert of one Ancestor, should be intercepted by the crimes of another k;" yet it is with pleasure, I see the approach of that day, when the post-humous rigours of forfeitures will cease, and the impediments of descent no longer affect a blameless posterity.

The Stat. 7 Ann. c. 21, provides, that, after the death of the then Pretender, no attainder for treason shall extend to the disinheriting of any heir, nor to the prejudice of the right, or title of any person, or per-

order sold the avoids willide of no

k Confiderations on the Law of Forfeiture.

fons, other than the right or title of the offender, or offenders, during his, her, or their natural lives only; giving also a power of entry after their deaths, as if such attainder had never happened.

It was thought expedient, in the year 1744, to suspend the operation and effect of this statute, till after the decease of the present Pretender and his brother.

This suspending clause was debated with great warmth and profusion of learning, between Sir Dudley Ryder, and Mr. Fazakerly is by the latter of whom it was contended, to be virtually subversive of the conditions of the Union, inconsistent with the spirit of our constitution, with the distates of humanity, and the principles of policy. It was first moved in the upper house by Lord Bathurst, seconded by Lord Hardwicke, and was there also the subject of much eloquence.

In fact, when the act of Union passed in the fifth year of the Queen, this point had been left undetermined; but, upon a tacit undertaking, well understood on the part of the Scots, (who had no intention to make, them-

themselves liable to English attainders) that it should be afterwards adjusted. The subsequent Act was accordingly framed of for improving the union of the two kingdoms !" But, as a total immunity from the forfeiture of real estates was not founded on any requifition of Scotland, either expressed or implied, it is difficult to conceive the reason which induced the parliament to carry the remedy fo far beyond the grievance then in contemplation. follow hatgeneding clause was debaged with

The mere execution of the criminal is fleeting example; but the forfeiture of lands leaves a permanent impression: It is indeed one of our best constitutional safe-guaards, when applied with diferetion to the prefervation of moral conduct, and used without violence to the correction of guilt. This branch of the penal system will not therefore be suffered to fall from the body of our law without alto the lubject

Stat. 7 Ann. c. 21. the preamble is in the following words. "Whereas nothing can more conduce to the improving the union of the two kingdoms, than that the laws of both parts of Great Britain, should agree as near as may be, especially those Laws which relate to High Treason and the proceedings thereon, as to the nature of the crime, the method of prosecution and trial, and also the forfeitures and purishment of that offence; which are of the greatest concern both to the King and the Subject," chem-

ferious consideration: but we may safely conclude, that the corruption of blood, with all its endless consequences, will have a speedy and total abolition; as any further intervention of Parliament therein would be contrary to that sacred regard, which is due to national compacts.

§ 6. But it should be observed, that this Provision extends to Attainders, only in cases of high Treason: they will still operate in full force upon the crimes of petty treason, and on many of, if not all, the higher fealonies.

If such an inconsistence be suffered, it will make the English law the very reverse of the system of Areadius; who, leaving treasons liable to the utmost severities, speaks of other offences in the following words: "Sancinus "ibi esse panam, ubi & noxia est; propinquos, "notos, familiares, procul a talumnia submowemus, quos reos sceleris societas non facit." Nec emim affinitas, vel amicitia, nefarium crimen admissant: peccata igitur suos teneant auttores; nec ulterius progrediatur mesus, quam reperiatur delictum."

period confidences, but we may latch conclude that IV corque An oHoles, who all its endless confidences, will have a speedy

Of Imprisonment.

Imprisonment, inflicted by law as a punishment, is not according to the principles of wise legislation. It finks useful subjects into burthens on the community, and has always a bad effect on their morals: nor can it communicate the benefit of example, being in its nature secluded from the eye of the people.

These objections are obviously true; but their influence on the Laws of England hath not been uniform. It is not unusual, by the positive institutions of this land of liberty, to punish offenders by consinement: in many cases, temporary; in others, as in the instance of striking at any person in the King's courts of justice, of rescuing a prisoner, and in every case of Præmunire, perpetual. And in this light, as a mode of punishment, it was considered in the earlier ages of our Law; of which I find the following instance in the

statute

CHAP

flatute of Westmi the 2dp At D. 1285. " Qui monialem a domo sua abducat, licet menialis consentiat, puniatut per prisonam trium annerum, et satisfaciat domici, a qua abducta fuerit, competenter." die Marces, which has

Tours a transactions, it will fall to the lot of \$ 2. It is the proper end of custody, to keep those, who are accused of injuries to society, amenable to the decisions of justice. But, as acculations are not proofs; and as innocence is to be prefumed in every stage of the charge, previous to the conviction of quilt; the utmost tenderness and lenity are due to the person of the prisoner. And here it should also be observed, that it is contrary both to public justice and public utility, to throw the accused and convicted, the inno-

m 13 Ed. I. c. 34.

n The power of taking bail, which in effect is only a a The power of taking bail, which in effect is only a milder species of custody, is a consequence of this prefumption; and appears to have existed in every polished system of laws, with regard to all offences except those of the highest enormity, in which nothing less than the person of the accused as thought to be a sufficient pledge for his foture appearance. Such particularly is the idea of our law, and such was the language of the Roman Digest. In disculs are consistends: of reas, gai fide-justores dare poerit, mile tam grave scalar committé debast. Digest, at magas fidejustribus, reque militibus committé debast. Digest, alviii, t. 3. 3. coincipal to B 21

cent and the guilty, indifferiminately, into the fame Dungeon and was been supported to the

o tikelis etalentatik, jaraiskat han pertause trisio

From a numberless variety of accidental circumstances, which happen in the course of human transactions, it must fall to the lot of many, to become infolvent. Debtors therefore, though certainly a species of Criminals, should in general be considered rather as unfortunate, than culpable. Humane treatment they have a claim to; nor can we confistently with any good principle, either of morals or government, refuse the same to persons accused, or even to the most atrocious convicts. It will follow, that a special care should be taken, that the necessary miseries of a jail may not be aggravated by the unrestrained cruelty of the jailer.

2. I might refer to the very excellent provision of the civil law on this subjet P;

It feems to be a defect in our government, but incapable perhaps of any practicable remedy, that the conduct of infolvent persons, prior to their insolvency, is not; except in the instance of Bankrupts, subjected to some legal mode of inquiry. The case of a confined debtor, whose consinement is the mere consequence of inevitable missortunes, without any mixture either of criminality or neglect on his own part, is extremely pitiable, and contradictory to every just principle of legislation.

P Domat's Civil law, v. ii. p. 287.

but fuch peculiar attention hath been shewn to it both by the common, and flatute law of England, that nothing more can be defired; except that improvement in the airiness and extent of the buildings, which the industrious refinement of a fentible age is foon likely ולחו לו כעורים מים מים מים מים מים מים מים בים בים בים בים בים כל grand of against by a larg very comprehealing

The appointment of jailers refts with the theriff, who is in tome degree responsible for their good behaviour q, and interested therefore in the choice of proper persons; from whom he is also required to exact very ample fecurity. The body of a man dying in prison is not to be interred, until the Coroner's inquest hath examined it : and, in, point of law, if a prisoner dies in dures of the jailer by hard confinement, and feverities unnecessary to the fafe custody, it is murder. These preventives of fecret tyranny fon of Pignetolic Ichies been well of the policy

a Dalt. c. 118. A. Rep. 34. 12 Inft. 52. 91.

Strange, 856, and 884. The cases of Castel & Bambeldge and Corbet; and of the King & Huggins. Mr. Justice Foster, p. 322, hath inadvertently stated the opi, mions collaterally given by the court in these cases, as the positive decisions of the court against the defendants: whereas in the first case, there being no pretence to charge either of the appellates, the jury brought them in 'Not guilty;" and in the other case, "it is the judgment of the "court on the special verdict, that the prisoner Huggins is not guilty, and therefore he must be discharged."

have been well preserved to the subject by frequent prosecutions, the effects of useful and compassionate enquiries, occasionally instituted by the two houses of Parliament. And lastly, the abuses, extortions, and insults of jailers towards the unfortunate perfons in their custody, are more particularly guarded against by a late very comprehensive statute; the provisions of which are very beneficial both to debtors and criminals, though more especially intended for the former, and the statutes of the stat

§ 3. This extraordinary anxiety of our law in favour of prilopers is by no means superfluous, for it must be consessed that jailers are in general a merciles race of men.

The Count de Laurun passed the long incerval from the year 1672 to 1682 in the prison of Pignerol. It has been well observed, "that, with pen, and ink, and paper, albeit a man cannot get out of prison, he may do every well within, and at last come out a wiser man than he entered;" but these consolutions did not fall to the lot of the Count

4.32 Gep. II, c. 28.

SVERI

de Lauzun.-At a distance from the voice of friend or relation; without any founds except his own fighs; without any light except the glimmering through the ruins of the roof; without books, means of occupation, or poffibility of exercise: a prey to hope deferred, corroding languor, and uninterrupted horror; he at last, as the only means of avoiding infanity, had recourse to the expedient of taming a spider — Misery, says Trinculo, makes a The spider received his slies every morning with gratitude, carried on his webs through the day with alacrity, and engaged the whole attention of his benefactor; until the jailer, conversant in scenes of wretchedness, and confequently freeled against every tender sensation, accidentally discovered this amusement of his prisoner, and in the wantonnels of tyranny officiously destroyed the subject of it. M. de Lauzun afterwards declared, that he conceived his agony on this occasion to have been more painful than that of a fond mother on the loss of a darling child.

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adi iqoma de la pes modifica selah men sal

de l'assain - Le a differer ji on the voice, of

Of Gorporal Punishments, and of Infamy.

thought a very diffraceful fentence to the criminal, to lose the privilege of lending his wife to another man, or to be confined to the society of virgins,

The authenticity of the fact is immaterial, if the inference be admitted; which is, that, in a moderate and virtuous government, the idea of shame will follow the singer of the law; and that, whatever species of punishment is pointed out as infamous, will have the effect of infamy. Existimatio est dignitates illess status, legibus ac moribus comprobatus, qui ex delicte nostro, authoritate legum aut minuitur, aut consumitur. The punishment of strangling is deemed honourable by the Ottoman family, who think it infamous, their blood should be spilt upon the ground; in England, it is

w Dig. L i. t. 13. 5. 5 1.

thought

thought a more respectable death to be beheaded at a reward familian to gaing flid

the stamp of ignominy is intrusted to their disposal; and let them, use with occonomy, and discretion, this best instrument for the promotion of morality, and the extirpation of vice.

Shame loses its effect, when it is inflicted without just and cautious distinction, or when, by the wantonness of oppression, it is made familiar to the eye. The feasibility of the people, under so extravagant an exertion of power, degenerates into despondency, baseness, and stupidity: their virtue is of forced extraction, the child of fear, with all the meanness of the parent entailed upon it. The tranquillity of such a state, says Monresquisu, is the meanness of a city, which the enemy is about to storm.

The present Empress of Russia is aware, that immoderate efforts are the symptoms of insufficiency, and have always more fury than force; that the security of the prince decreases in proportion to the exorbitance of his despotisfin;

out hit to be infamous in the edimation of

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tifm; and that the national fentibility is the best spring of national power. But a few years ago, prior to the reign of the late Empres Etizabeth, it was no more difgrace to a Ruffian nobleman to receive a public flogging from the arm of the hangman, than it is at this mortest to a milerable Japonele to pay with his 4kin the cons of a civil action, thought nugatory by the judge. The Muscovites no longer wed their wives with a whip inflead of a wedding ving ; and Ruffia viles into the irespect of Europe. The Japonele Rill fubrit to the daily discipline of the last; and Japan continues the contempt of the world. The cudgel (lays du Halde) is the Governor of China; the Chinese (fays the writer of Lord Anson's voyage) are eminent for timidity, hypocrify, the meanners of the parent explanatio bins The tranquillity of fuch a flate, fays, Mon-

affecting the body, and publicly inflicted, ought to be infamous in the estimation of the people; so should degradations from titles of honour, civil incapacities, brandings, and public exhibitions of the offender; all which penalties should be applied with

April 10 minutes

with great caution, and only to offences infamous in their nature, famile a many gold

clergy. In like manner by the laws of

& A. In any case, to fix a lasting, visible stigma upon the offender, is contrary both to humanity and found policy. The wretch, finding himself subjected to continual insult, hecomes habituated to his diferace, and lafes all fense of shame. It is impossible for him to form any sirreproachable connection; for virtue, though of a focial nature, will not affociate with infanty. Yet this practice of branding hath prevailed in every known fystem of laws; as with us at present, in the punishment of many offences, and in

^{*} The Preamble of flat.; Ann. c. 6, is a frong inflance in support of this position.— Whereas by stat. 13
** & 12 W. M. § 6 it is enasted that all and every per** fon and persons, who should be convicted of any Thest,
** and should have the benefit of Clergy allowed there** upon, or ought to be burnt in the hand, should be
** burnt in the most visible part of the lest cheel neurost
** the gose: and whereas is bath beet sound by experience,
** that the said punishment bath not bad the defined essent
** crimes and offences, but as the contrary, such offences be** ing readered thereby limit to be ensembled in any bonest and
** lawful way, become the wore desperate: Be it therefore
** enacted, that the aforesaid clause shall be and is
** hereby repealed.** the right may a repute out of successiving, schulped and the glasge. Color Lip de la la la garage de la all

all cases, when the offender, not being a clergyman, is admitted to the benefit of clergy. In like manner by the laws of France, " Ceux & celles, qui après avoir été es condamnes pour vol, ou flétris de quelque au-" tre crime que ce foit, seront convaincus de rè-" cidive en crime de vol, ne pourront être condannes a maindre peine que, scavoir les de bommes aux galeres à tems, ou à perpétuité, es et les femmes à être de nouveau flécries d'un " W. fi c'est pour récidive de vol, ou d'un fimple « V. fi la premiere flétrissure a été encourue pour autre crime y. Et ceux qui feront conda aux galeres à tems ou a perpetuité pour " quelque crime que ce puisse être, ferront " flétris, avant d'y être conduits, des trois let-" tres G. A. L. pour, en cas de récidive en " crime qui mérite peine afflictive, être punis de " mort " So also among the Romans, it was usual, but only when the crime was in? famous in its nature, to affix fome branding, or ignominious letter, on the forehead of the criminals; and persons so branded were afterwards called, inscripti or stigmatici, or, by a

y Code penal. 8vo. A. D. 1755. p. 105. Declaration du Louis XV.

5 lbid. p. 138.

more equivocal term, literati . One might almost say that those literary acquisitions were in fome infrances voluminous: for Zonaras relates that Theophilus the Emperor caused twelve verses to be inscribed on the forehead, of two monks; and we find in Petronius, " quod implevit Eumolous frontem Encolpi & Gytonis ingentibus literis & notum fugitivorum epigramma per totam faciem liberali manu durit. And a said shoot any data and ha the

the oppore the volume of the properties full \$ 5. There are two kinds of infamy, the one founded in the opinions of the people respecting the mode of punishment, the other in the construction of law respecting the future credibility of the delinquent: the law of England was erroneous, when it declared the latter a consequence of the punishment, not of the crime b. There still exist some unrepealed statutes, which inslict perpetual infamy on offences of civil institution . But in general the rigour of this doctrine is now

a Ccel. Rod. l. vii. c. 13. Nulli Samiis literatiores. Plant. Caf. II. vi. 49. " Si bic literatus me finat."

I was mistaken in supposing that this expression had been adopted by stat. 4 H. VII. c. 13 which recites " that divers persons lettered had been more bold to commit missions deads. See " The commitment of the chievous deeds, &c." That word clearly relates only to

scholars and the clergy.
b Coke, Litt. 6. b. 2 & 3 Edw. VI.

reduced to reason di anchit is holden that unless a man be put in the pillory, for stigmatized, for crimen fulfi, as for perjuty, forgery, or the like, it infers no blemith on his attriftation. It may be highly penal to engross corn, or to publish a pamphle offen five to government; but mercantile avaries. and political fedition, have no connection with the competence of teltimony; the credit of an oath can only be overbalanced by the nature and weight of the precedent iniquity. Such was the reasoning of the Roman law. " Itus fuftam infamiam non im-" portat, sed causa, propter quam id pati me-" ruit; st ea fuit, que infamiam damnato ir " rogat" is apalab at to visidifine state? of England was errondous, when it destared

6 6. I fay nothing of baltinadoes, mutilations, and a variety of other modes of corporal punishment, equally inconsistent with decency and humanity: fuch refinements of cruelty put the whole species, rather than the criminal, to difgrace. CARLON STONE STONE

Artaxerxes moderated the feverity of the laws of Persia, by enacting that the nobility dievines dieve, be. "AThat word clearly total

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who debased themselves, instead of being lashed, which had been the practice, should be stripped, and the whipping be given to their vestments; and that, instead of having the hair plucked off, they should only be deprived of their high-crowned Trans.

5.7. The English constitution, ever anxious to preserve the virtuous pride of the people, hath used this branch of the penal code with a reserve so serupulous, that it may almost be doubted, whether more attention hath not been shown to the protection of this principle, than to the preservation of life: for corporal pains might certainly with good effect be substituted, in some cases, in the room of capital judgments:

Yet, without any very ftrict fcrutiny into our flatute books, one may point out many provisions still existing, which are disgustful to humanity, and offensive to common sense.

It is easy to conceive, why the hand which gives a blow in a court of justice should be cut off by edict of law; the analogy between the offence and the penalty is evident: though it was at least a condescension to minute-

minuteneffes in that parliament, which, "to " give more folemnity to the operation." s ordered the master-cook, and serjeant of the larder to attend with dreffing knives; the serjeant of the wood-yard to furnish a chopping-block; the yeomen of the fcullery to attend with a pan of coals, and the ferjeantfarrier to bring hot irons to fear the stump. But it is not so easy to acquiesce in the propriety of punishing a blow given in a churchyard, with the loss of an ear by though we are told, that it was intended to obviate the quarrels of Protestants, and Papists, at the first establishment of the Reformation. Under a fimilar difregard to relative propriety. Henry the first seems to have enacted " quid falfarii monetæ oculos et genitalia amitterent, absque aliqua redemptione !." Less absurd was the conduct of Severus, who punished a notary for the exhibition of a forged plead-

provinces that exciting which greats

-SECTION 1

8 Stat. 33 Hen VIII. c 12.
h 5 and 6 Edw. VI. c. 4. or, "having no Ears, the offender shall by branded with the letter F in his cheek."

i Wilkins, Angl.Leg-fax. p. 304. Knyghton, p. 2377. and in the Annales de Margan, fub anno 1724. "Monetarii autem numero xctv. jussu Regis in Normannia confistentis die Epiphaniæ Genitalibus privati sunt." And in the Records about the time of the Conquest, it is very frequently said, in regard to other offences, that the convict " pro selonia sua suit occeptatus, et ementulatus, et bona sua eschaet. Regi."

ing, by ordering the nerves of his fingers to be cut, that he might never be able to write again; as was also a Law of Edward the First, how unjuminable soever on account of its crucky, against the third offence of these from the lead mines in Derbyshire; that a knife should be struck through the hand of the criminal fixed on the table; and that in this agony and attitude he should continue, till he had freed himself by cutting off his hand.

The eighth of Eliz. c. 3. punishes with imprisonment, and the loss of the left hand, the sending of live sheep out of the kingdom, or the embarkation of them on board of any ship; and this too, without any exceptions of the necessary provisions for the ship's crew: the second offence is made only a clergyable selony.—Sir Edward Coke thinks!, that the benefit of clergy might be pleaded, as well in case of cutting off the hand, as in case of selony; if so, and if the offender were fortunate enough to have learne to read, he could never have suffered under this ast.

La Fuller and Observ. on the ancient Statutes, p. 380.

1 3 Inst. 104.—Staunford 37. b. in reserved to by Sir Ed. Coke; but I have not been able to find any such opinion.

The 14th of Eliz. c. 5. directed vagabonds to be severely whipped, and burned through the ear with a hot iron, the compass of an inch; and for the second offence to suffer death. This was a temporary act, and not continued in force.

It will not easily be credited by those, who do not possess the Statute which I am about to mention, yet it is certainly true, that by Stat. 10 Geo. III. m c. 19. A. D. 2770, " every "person whatsoever, taking, killing, or de-

in It is remarkable, that this Statute was made at a time, when "the Commentaries on the Laws of England" must be supposed to have been very recently perford by every Member of the Legislature. The writer of that admirable work hath, with peculiar anxiety, shewn "the necessity of not deviating any surther from our ancient constitution, by ordaining new penalties to be insticted upon summary convictions."

And furely, the corporal punishment of an Englishman, by the suffrage of one person only, is inconsistent with every idea of English Liberty. Yet this unfatisfactory mode of trial was instituted for the promotion of speedy justice; and as a species of mercy to Delinquents, who, in trivial misdemeanors, might otherwise be ruined by the expence and delay of frequent prosecutions by indicament: but it hath been extended in a degree truly formidable. The Courts Leet and Sheriss'a Tourns are fallen into disuse, and the jurisdiction of individuals is aggrandized beyond measure: a jurisdiction, which, by its burthensome consequences becoming disgustful to men of fortune and education, too often fails into the hands of the mercenary and the ignorant.

" stroying any hare, pheafant, partridge, " moor-game, &c. or using any dog, gun, " &c. for that purpole, between an hour after " fun-fetting, and one hour before fun-rifing, " and convicted thereof before one or more " justice or justices, upon the oath of one or " more witness or witnesses; shall for the " first offence be imprisoned, not less than "three months, for other offences not less "than fix months; and either for the first, " or any other offence, be once publicly whip-" ped in the town, where the jail or house " of correction thall be, within three days "from the time of his commitment, between " the hours of twelve and one o'clock in the "day." And this is enacted even without any reservations, or distinctions, as to the rank, quality, or fortune of the offender.

The tacit disapprobation of mankind configns such laws to disregard and oblivion: but they should be repealed, to prevent every possibility of oppression on the one hand, and to stifle all hopes of impunity on the other.

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Pleuriary penalties form the laft, and best class of those salutary restraints of law, which alone render national liberty rither valuable or permanent. It is a wife and merciful institution, which converts the little attachments of selfishness, into the strong holds of society. Let the inordinate sellies of profligacy be controlled in their first efforts; and the frequency of capital, and corporal punishments, will soon become unnecessary: that frequency, so fatal to the present, and future happiness of the sufferers, so subversive of every sentiment of national benevolence!

There exists however to this mildest made of punishment a plansible objection, which makes it seemingly repugnant to the genius of a government, formed and supported on maxims of freedom: the quantum of the fine must in most cases be left to the discretion of the Judges.

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constitution being and control of the

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The value of money and property is subjected to daily and unforescen fluctuations: the circumstances of the offenders, like the circumstances of their offences, are infinitely various. It is impossible therefore, in this age of refinement, to imitate the fimplicity of the Ancient Britons, to annex fpecific penalties to specific classes of crimes, and to establish a wholesale traffic between criminals and courts of justice,

Howel Dda found no difficulty in faying of that the fine for murdering a Chancellor should be 189 cows; for killing the Queen's cat, as much wheat as would cover her, when fuspended by the tail; for a perjury, three cows; for the rape of a maid, twelve cows; of a matron, eighteen; and in cases of seduction, " Vir, fi factum denegoverit, jurabit super campanam ecclesia malleo destitutam : quod fi fassus fuerit, compensabit denariis totidem, quot nates famina operiantur.

I see no reason, except what arises from their internal absurdity, to doubt the authen-

n Leges Wallicz, p. 116. 202, &c.

F 3 ticity

ticity of these laws o; or to suppose, that they were not the most ferious efforts of Welsh Jurisprudence. For on this point, the fame want of common delicacy, and common fense, is very conspicuous in the Inftitutes of our good King Alfred P; and in the ancient Codes of the Burgundians. and of Sweden, and indeed of all the German nations. They had no fettled rule of distinction between accidental damages, and intentional injury; between voluntary, and involuntary acts. "It was (fays a learned Writer) the first indication of the approach of these nations towards politeness, that their compositions for injuries done to women were generally doubled 9,"

In short, in the ages of imperfect civilization, " Justice seems to have been administered, merely to give a protection to the criminal against the party injured;" and this protection was given to the former, in con-

They were made, A. D. 914. Adhibitis populi frequentibus comitiis in Casa Candida super sluvium Taf.

Spelm. Gloss. p. 362.

P Leg. Anglo-sax. p. 37.—Civil. Reg. Sueciae, t. xi.

Lord Kaims's Law-tracts, p. 32, &c. L'Esprit des loix, l. xx. c. 20. .

fideration of the fine, which the latter was obliged to receive !. This was called a composition, and the resentment of the offended family was cancelled. Such is the character given by Tacitus of the Germans: " Sufci-" pere inimicitias seu patris, seu propinqui " necesse est; nec implacabiles durant : luitur " enim etiam bomicidium certo armentorum ac " pecorum numero, recipitque satisfactionem tota Gedomus."

We find also in Homer frequent mention of the price of blood as paid to the representatives of the deceased; and the ninth book of the Iliad is founded entirely on the efficacy of prefents in the expiation of an injury.

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Fifth, v. i. p. 44

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By fuch means individuals were first taught to acquiesce in the general dispensations of law, and by degrees to confider injuries to themselves as injuries to society. But, prior to the establishment of these compositions, "Every offended Baron buckled on his armour, and fought redrefs at the head of his vaffals. His adverfary met him in like hoffile array. Neither of them would submit points in which their paffions were warmly interested, to the flow determination of a judicial inquiry. Both trusted to their swords for the decision of the conteff : the kindred and dependants of the aggressor, as well as of the defender, were involved in the quarrel."
See Dr. Robertson's Hist of the Emperor Charles the

§ 3. In the course of society, riches must branch into very unequal proportions; and stated fines to specified crimes must become subjects of mockery and indifference to some offenders, of ruin and desolation to others and their families.

A modern Lawgiver shrinks therefore at the recital of the ancient amercements: he feels, that the Law on this point cannot, confistently with reason, be fixed, and determinate. The enormity and tendency of the crime, the malice and wilfulness of the intention, the inconsiderateness and suddenness of the act, the age, faculties, and fortune of the offender, form a chain of complex questions; which can be resolved only by the evidence of each separate charge, and for which no human foresight can provide.

Here then arises a necessary appeal to the breast of the judge, an appeal, which under the families of Tudor and Stuart, became occasionally the instrument of extortion and tyranny: but which was, even in those reigns, (for the Bill of Rights was only declaratory of the old constitutional privileges) subjected by the law of England to such wife regulations,

and barriers, as ought to have focured to the fubject every benefit of certainty.

It is the ulage of the courts, superinduced on the clause of Magna Charta relative to civilamercements , never to extend the fine of any criminal fo far, as to take from him the implements, and means of his profession; and livelihood; or to deprive his family of their necessary support. If the produce of his property, under those humane restrictions, be thought inadequate to the degree of the offence, some corporal punishment is inflicted. or stated imprisonment: the impropriety of the latter, as a penal judgment, I have already observed. As a further safeguard against possible oppression, all grants and promises of

c. so. Liber homo non amercietur pro parvo de-licto, nifi secundum medum delicti, et pro magno delicto amercietur secundum magnitudinem delicti, salvo contra-mento suo, et mercator sodem modo salva mercandisti sua, et villanus eodem modo amercietus salvo qualmagio suo, si incideriat in misericordiam nostram; et nulla predic-tarum misericordiarum ponatur nisi per sacramentum proborum hominum de visneto; comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti. modum delicti.

The idea of leaving to the defendant the tools in trade and husbandry, and the beafts of the plough, appears to have been taken from the Roman law.

See Gilbert's Forum Romanum, p. 25, and Wood's Civil Law, p. 334.

fines,

fines, and forfeitures, of particular persons, before conviction, are illegal and void.

§ 4. The wisdom of our Law, having thus amply secured the property, and personal freedom of the subject, hath rarely thought it advisable to affix certain sum to specified crimes:

I shall however mention one instance to the contrary; which, on account of its singularity, deserves attention.

The 39th H. VIII. c. 6. intituled, "the bill for burning of frames," and still in existence; for the better prevention also of the cutting out of beasts tongues, and the damms of stew-ponds; the cutting off the ears of his Majesty's subjects, and the heads of conduit pipes; the barking of apple-trees, and divers other like kinds of miserable offences, to the great displeasure of Almighty God, and of the King's Majesty;" gives treble damages, recoverable by action of Law, to

v Bill of Rights, stat. 1 W. and M. stat. ii. c. 2. But it was long before holden by Sir Edward Coke to be an illegal practice. "For when a subject obtaineth a pro- mise of the forseiture, many times undue means, and more violent prosecution is used for private lucre, tending to destruction, than the quiet and just proceeding of law would permit, and the party ought to live of his own, until attainder." 2 last, 48.

the party injured, and a fine of x l. sterling to the King's Majesty.

This statute wants no observation upon it; except, that I have not stated it on account of the equivocal idea of treble damages for an ear: treble damages have in all cases the sound of absurdity, though not uncommonly prescribed in statutes, which give penal Actions,

§ 5. The excellence of the Penal system consists in the reasonable selection of the objects of its coercion, in the moderate and judicious application of its penalties, in the perspicuity of its expression, in the notoriety of its mandates, and in the certainty of its execution. But it may be rendered still more perfect by the addition of certain salutary precautions, which savour in some degree of punishment, though intended in their general purport merely for the prevention of crimes.

And here it is with pleasure, that I take the opportunity of mentioning an institution full of Wisdom and Humanity, of ancient use in England, and very impersectly known to any other country. That wise institution

of our Ancestors I mean, which, dividing the people into certain classes, compelled the feveral neighbourhoods or divisions of men to become mutual pledges for the good behaviour of the individuals, who composed them; and confequently, when any offence was committed within their diffrict, either to produce the offender, or become liable to fuch penalty as might be thought proportionable to the injury offered to the peace of Society. Securitas fiebat scilicet, quod de omnibus villis totius regni Sub decennali fide-justione debebant effe universi; ita quod fi unus ex decem foris-fecerit, novem ad rectum cum baberent: " summa et maxima securitas, per quam omnes statu firmissimo sustine. bantur!

The additional facility of mutual intercourse between the different provinces of the kingdom, the improving uniformity of language which arose from that intercourse, the increasing numbers of the people, and their unsettled inhabitancy occasioned by the pursuit of commerce, severally contributed to throw this plan of police into gradual disuse. In its original extent-it is become perhaps

Wilkins, Leges Edwardi, c. 20.

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impracticable, but fome of in belt veriges are full visible in our Laws, non-monthly with

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In general, every person, as seven a wife against her husband, or a husband against his wife, who bath came to apprehend that another will do any corporal hurt to him hath a right to compel such person to give security to a magnificant, that he will not do any tell; that shall amount to a disturbance of the peace; and this is called a recognitional of the peace. It is in the nature of a conditional debt, payable only to the King, but in which both the King and the subject are supposed to have an interest.

The complainant must verify upon oath, that his application to the Magistrate is not made from motives of malice, or to give vexation; and, if the person complained of shall refuse, or be unable to find sufficient surery, he shall be committed to prison.

^{* 1} Hawk. P. C. 126. Commentaries, b. iv. c. 18.

y For which reason it seems an absurd position in our law, that a recognizance may be discharged by the demise of the king for that it may be released by the party at whose complaint it was taken.

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It is also usual, upon the conviction of certain Misdemeanours, to make furcties for the future good behaviour of the offender, a part of the punishment. And it is holden under the Stat. 94 Edw. III. c. 1. that the Magifirate hath a differetionary power to take fuch furety from all persons of evil fame, or, in other words, whom he shall have just cause to fuspect to be dangerous, quarrelfome, or scandalous; as from those, that sleep in the day, and go abroad in the night; and fuch as keep fuspicious company. All fuch persons are prefumed to have been in some degree criminal in their conduct: and confequently to be the proper objects of that preventive justice, which is calculated for the amendment of offenders, the example of others, and the fecurity of the state and on or roundition and and

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§ 1. THE Roman Law permitted the murderer to remain on the gibbet after execution, as a comfortable fight to the friends and relations of the deceafed 2. Of volence production of the people?

Nec furtum feci, nec fugi, si mibi dicat Servus: Habes presium; loris non weers, aio. Non bominem occidi: Non pasces in cruce corvos ... descentist, titim tome check out the fin of the

The Molaical Law directed the body of the criminal to be buried on the day of his death, " that the land might not be de-" filed b." the general penent, respectively

² Ut it conspedu deterreantur alii, et Solatio sit cognatis interempterum. st. 48. 19. 28. § 15.—A. D. 1741, when the English Regency made an order to hang the murderer of Mr. Penny in chains, they inserted therein "that it was on the petition of the relations of the deceased." St. Tr. vol. x. 39.

^a Horat. Epist. L. i. ep. xvi. 46.

^b Denteron, xxi. 22.

b Degteron. xxi. 23, the Abra or have

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It cannot with any propriety be faid, that there is inhumanity, but it may be doubted, whether there be wisdom, in the adoption, which the Luws of England have made on this point, of the rescripts of the Emperors, in preference to the command of Moses.

We leave each other to rot, like scarecrows in the hedges: and our gibbets are crowded with human carcases. May it not be doubted, whether a forced familiarity with such objects can have any other effect, than to blunt the sentiments, and destroy the benevolent prejudices of the people?

- § 2. The ignominious burial of persons guilty of suicide might perhaps, if strictly executed, form some check on the sin of self-murder; but, in this case, Juries are more generally guided by the momentary impulse of compassion, than by a proper attention to the general benefit.
 - \$ 3. To the diffection of criminals it is impossible to offer any solid objection. Modern ages will confine it to the dead, and turn a deaf ear to the anatomist, who laments the Æra of his own existence, "We pre iniquitate

iniquitate temporum, vivos bomines diffecare non licet ."

§ 4. There is a feeming liberality of fentiment in the proposal, to subject certain classifies of criminals to medical experiments for the benefit of mankind. England was by these means enabled to extend inoculation through Europe, and consequently to save the lives of millions.

I am apprehensive, that I dissent from a very learned writer d, when I assert, that such a plan can never with any propriety receive the legislative sanction.

If the experiments be without hazard, they are unnecessary; because equally practicable on the innocent and on the guilty; if of a nature to maim and disable; they are cruel and impolitie: if dangerous to the life; the uncertainty of the event destroys all the so-lemnity of the example in the eyes of the people. The criminal himself too expects the decision, under all the heated anxiety of a gambling adventurer; and meets the perils of

e Vide Corn. Celf. in Præfat.

d Observations on the ancient Statutes, p. 35311

G death

82 PRINCIPLES

death in a state of mind, very unsuitable to the dictates and temper of Christianity.

The modern advancement of medical knowledge, and the benevolence of its professors, make such aids useless and ineligible.

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A general Idea of the Connection between Punishments and Crimes.

W HEN we follow the unrestrained of course of our thoughts, instead of laying down premises, and deducing conclusions from them, we reason from conclusions only: we begin our researches at the mouth of the stream, and thence investigate the spring.

The political liberty of a state consists in the security of the people; that security bears a proportion to the justice, and wisdom of the penal code, which protects innocence by the chastisement of guilt. But the justice, and wisdom of every penal law depend on its analogy to the particular quality of the crime, to which it applies. The punishment then becomes an established consequence, unconnected with the caprice of authority, and slowing from the very nature of the offence.

It is not sufficient therefore to have stated the right of punishment, and the different classes of punishments; it is also necessary to consider the several species of crimes, their definitions and gradations.

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The superstructure, as the most striking object, first caught my attention; it remains to examine the foundation.

e of The agree deceletive wantonbels of a centerous inagenation, however dengerous, to even the conferment of a country of the service to a country. It is a passion inferential from the effence of the frames mind,

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the control of guilt. But the julited and

control of Crimes.

St. CRIME is distinguishable from fine: for every crime must be a positive breach, or wilful disregard, of some existing public law. But many offences against earthly authority are po otherwise sinful in the eye of Heaven, than as infractions of that implied contract of obedience to the legislature, to which every member of society is subjected: and there are many species of sin, which, in a legal sense, cannot be criminal, because in their nature not obvious to human accusation.

§ 2. The mere speculative wantonness of a licentious imagination, however dangerous, or even sanguinary in its object, can in no case amount to a crime. It is a passion inseparable from the essence of the human mind,

This distinction, says a learned writer of the last century, was known both to the Greeks and Romans, in the words and romans, in the words and romans, syntages, Peccasym, Crimen.

to delight in the fiction of that, the actual

force except treated, is treated with a mode-Dionyflus the tyrant is faid to have punished with death one of his subjects, for dreaming that he had killed him. This was hardly more iniquitous, than the execution of the gentlemen f, who, having a white deer in his park, which was killed by Edward the Fourth, withed the deer, horns and all, in the belly of him that counfelled the King to kill it; "whereas in truth no man counfelled the "king to it:" or than the attrainder, and execution of Algernon Sidney, on the evidence of private, and unpublished papers, without any proof, or even a fuggestion of their intended publication; without eyen an averment, that they were relative to the treasonable practices charged in the indictment & vione of or blat of live or new Water

resolution to do some criminal act, and are punishable only when that resolution is

Sooffeding sed around Linealt in Joseph and

Sycal

Markhem Ch. J. rather chose to quit his office, then consent to this. Baker's Chr. 229. Hale's Hill. P. C.

g In which case it is thought, that they might have been read in evidence. Foster, p. 191, hobers 4.1

capable of proof: but criminality even in this stage is only inchoate, and in all cases therefore, except treason, is treated with a moderated Teverity by our law; odwhich benevo-Jently Tuppoles a possibility of recollection, and repentance, in every moment previous to The lactual completion of the delignistic ground gentlement, who, having a white deer in his

This possibility was excluded by that was Elle. which made in felony is, to with loride. "The the death, or deprivation of the Queen, wio bany string to stat effection at annow it "Ling to it:" or than the attrainder,

Qui deliberant, desciverent, laid Taninas Sir Henerge Finch gave bubloody interpression to othis respiteffion, when the inferred botther we to doubt by besitate in despirit of allegiande. 15 directive and apollacy." in according treatonable practices charged in the indict-

When the will is faid to be equivalent to the deed, it should always be understood, that there hath been an actual, determinate endersours to far co-operating with othelintenfient that no new duertion of the imind could have intervened to prevent the effect of the crime, though that effect may cafully

have

capable

have failed; as if a man should stab another with intent to kill, chough by the skill of the surgeon the wound should not prove mortal, or discharge a bullet at his head, though he should mis his aim.

Thus every criminal charge must be founded on some fact, with the evidence of which every trial should commence. If that fact be established beyond the power of refutation, it then becomes necessary for the person accused to have recourse to the several suggestions, which are allowed by reason, morality and religion, to be matters of mitigation or exercise.

We find in every fystem of laws a great variety of elaborate distinctions, on the different gradations from the completest guilt, which is the accumulated result of both fact and intention, to innocence, which consists in a total deficiency of a mischievous will.

The colour of the acculation allumes a new tint, whether the person accused be responsible, as principal or as accessory; whether principal in the first degree, as actual perpetrator, or in the second, as aiding and abetting:

G 4 whether

whether as accellory before the fact, or after; whether justifiable on the several pleas of misfortune, ignorance, or compulsion: lastly, if there be a want of discernment or understanding, there cannot exist a malignity of mind; for such persons the law itself should anxiously apologize, on the appearance of their incapacity, whether it arises from the course of nature as in the nonage of infants; or from the visitation of God, as in the cases of idiots and lunatics.

But when the measure of proof is full; when the act and intention have both cooperated to establish the guilt of the offender; when every possibility of extenuation or excuse is precluded; then, and not before, let the arm of justice be stretched forth, and let that penalty be rigorously inslicted, which the law hath proportioned to the denomination of the crime.

k By the common law, an intention to commit a felony amounted to the fame crime in no inflance. And therefore in the case of Holmes, who set fire to his own house in the city of London, with intent to burn the house of his neighbour; as the fire did not extend beyond his own house, this was judged not to amount to the crime of Arson: I shall hereafter have occasion to mention some particular statutes which depart from this rule. Holmes's case is in Cro. Car. 577.

\$ 5. It is impossible to delineate any lystematic, or graduated scale of crimes, applicable to every legislation; for crimes are of temporal creation, and to be estimated in proportion to their pernicious effects on fociety. Municipal laws must be adapted to the temper and influence of the climate, the state of commerce, the occupations, number, and riches of the people; in short, to the nature, principles, and necessities of each particular government. The fame fact is therefore liable to a different construction under every different legislation. Solon made idleness a crime; and this, in the infancy of a democracy fo well regulated as that of Athens, was not unreasonable. In Holland it is a capital crime to kill a ftork; but such a provifion in the dry mountainous parts of Germany would be grossly abfurd. The fafety of the ancient Gauls confifted in the mere brutal activity of their bodies: "it was criminal therefore, fays Strabo, and punishable, for the young men to exceed the measures of their girdle, for it was conceived to be a proof of idleness and gluttony." In the warmer countries, which want the reftriction of the true religion, we fee polygamy established, or the use of seraglios permitted. Lawgivers

CHAR

are but men; and the wisest of them will too offen be influenced by their constitutional passions, though perhaps insensibly, in the laws which they frame. But in the temperate climate, which we inhabit, where the sexes are equally qualified for the pleasures of sentiment; and where it is not unusual for the wife, the mistress, and the friend, to exist in the same person; such pluralities would as ill agree with the temper and disposition of the people, as with the dictates of the religion which they profess.

\$ 6. Crimes then being relative to the nature of each particular government, they are incapable of general definitions: but it is very possible to establish certain leading principles, which should be ever present to the attention of human jurisdictions.

The President de Montesquieu hath considered crimes, as prejudicial to religion, to morals, to the tranquillity of the public, and to the security of individuals. This division seems liable to objections, though it may not be easy to make a better. I shall avoid therefore the arrogance of the attempt, by pursuing the detail without any methodical division of the subject.

CHAP.

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Of Crimes relative to Religion.

Religion hath been wifely established by law, as useful and necessary to lociety; and is so wrought into the very frame of our government, as to become a main part of the constitution. The magistrate therefore, though the well-being of the state be his peculiar object, is by no means exempted from a due concern for the religion of his country.

§ 2. But it is no confequence from these premiles, that men should be debarred liberty of
conscience, and the free use of reason and inquiry; much less can any argument be drawn
from them in favour of prosecution. Freedom
of thought is the prerogative of human kind;
a quality inherent in the very nature of a
thinking being; a privilege which cannot be
denied to him or taken from him. Montaigne
therefore had good cause for saying, in his familiar way, as that it is setting up one's own
opinions very high, to direct another to be
"roasted

"roafted alive for them." He spoke feelingly; for all the states of Europe were at
that time blazing with religious martyrdoms: and it seemed to be the fundamental
principle of all sects to execute and excirpate
each other.

§ 3. Even England, the feat of national liberty and benevolence, became the bloody scene of intolerance and perfecution; the ministers of peace and christianity were the active dispensers of death and desolation; and the perpetrators of the most malignant murders were clad in the pure mantle of religion.

The accomplished and sentimental Sir Thomas More caused Lutherans to be whipt, tortured, and burnt alive in his presence. Cran-

I it seems almost necessary to produce some instance in support of this affertion; and therefore I transcribe the following from Bishop Burnet, on whose historical sidelity we may rely as to all transactions except those of which he believed himself to have been an eye-witness.—" The clergy now resolved to make an example of one James Bainham a gentleman of the Temple: he was carried to the Lord Chancellor's house, where much pains were taken to persuade him to discover such as he knew in the Temple who favoured the new opinions; but, fair means not prevailing, More made him be whipt in his presence, and after he fent him to the Tower, where he looked on, and saw him put to the rack." Bainham was afterwards burnt. Hist. of the Reform vol. 1. p. 165.

mer led Arians and Anabaptifts to the stake. Bonner, Bishop of London, tore off the beard of a weaver, who refused to relinquish his tenets; in another instance of the same kind he scourged a man until his arm ached with the exercise; and held the hand of a third to the candle, to give him a specimen of burning, till the finews and veins shrunk and burst. Even Wriothelly, the Chancellor of England, directed a young and beautiful woman to be stretched on the rack, for having differed with him on the real presence; with his own arm he tore her body almost asunder, and caused her afterwards to be committed to the flames. In fine, infants, born at the stake, were thrown into the fire with their parents, as partaking of the same herefy.

Human nature appears detestable under such representations; which (as they are well described by a philosophical writer) sink men below infernal spirits in wickedness, and below beasts in folly.

Henry the Eighth, whose caprice was the bloody standard of the national faith m, ruled

earlies and that the all by hit

m It was made high-treason to believe this Prince to have been married to Anne of Cleves.

all fects by turns with a rod of iron: his scholastic fubility was equal to his cruelty; and we are told, that, in one infrance, he found fufficient reasons for lending three papifts with three protestants, their companions, in the fame procession to the stake. His daughter Mary, with less ingentity, polfeffed the fame rancorous and implacable zeal. And we accordingly learn, that in the space of three years, under the auspices of Bishop Gardiner, the committed two himdred and feventy-feven protestants to the flames. Human facrifices were at this period more frequent in the metropolis of England, than they had ever been in either Carthage, or Mexico: and in all these instances the future damnation of the heretic was believed to be the inevitable consequence of his death. additions describede

Whose beards the silver hand of time had touch'd, Whose learning and good letters peace had tutor'd, Whose white investments figur'd innocence. The dove and very blessed spirit of peace, Wherefore did ye so ill translate yourselves
Out of the speech of peace, that bears such grace, Into the harsh and bout rous tongue of war, And sivil massace? who shall believe, But ye misus'd the rev'rence of your place,

baye been married to Apree of Cityen a few mysters

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Under the counterfaired seal of God of June 1 ni miles and deeds most damable of the American Counterfaired seal of God of the American Counterfaired seal of God of the Counterfaired seal of Counter

This frenzy had sublisted here for more than a century P: I find the following account of the execution of Lord Copham. A. D. 1418. the minus botto find against a

Than was he layd upon an hurdle, as though he had been a mooft beyouse traytoure se to the crowne and fo drawne forth into " Sainct Gyles Felde, wheere as they had let "up a new paire of Galowes, than he was "hung up in a chayne of yron and fo con-" furned alyve in the fyre, and so be departed " bence mooft christenly. how the priestes that tyme fared and curfed, requiring the peoer ple not to pray for hym, but to judge hym " dampned in hell, for that he departed not

Destrum numen prætenditur foeleribus. Liv. xxxix. c. 16 Shakespeare.

all modernions alle brus P But it appears, from Godfridus Colonieras, who wrote A. D. 1234, to have prevailed much earlier on the Continent. " Eodem die, quo quis accusatus est, seu Continent. "Eodem die, quo quis acculatus est, seu ijuste, seu injuste, nullius appellationis, nullius deserminaris fionis resugio proficiente, damnatur, et slammis injustitur." This was founded on the following constitution of the Emperor Frederic: "Damnati per ecclessam judici saculari relinquentur, animadversione debita puniendi, clericis a suis ordinibus primo degradatis." See also Matt. Paris, p. 429, and Hale's Hist. P. C. i. 383. " in the obedience of the Pope, it were too " long to wryte. And this was done in the " yeare of our Lord Mcccc and XVIII 9, -

The writ de Haretico Comburendo seems to have been founded on the 2 Hen. IV. c. 15: it was first used with effect against William Sawtre, A. D. 1401, who had been condemned for herefy by the Convocation of Canterbury, and whose sentence had been confirmed by the House of Peers: it concluded in the following words, "ac ipfum bæreticum in eodem igne realitur comburi facias, in bujusmodi criminis detestationem, altorumque Christianorum manifestum exemplum. This writ was iffued fo late as the year 1611, by James the First, against Bartholomew Legat; an Arian, on a conviction before the Ordinary. Having sublisted three centuries, it was at last abolished, with all proceedings thereon; and all capital punishments in pursuance of ecclefiaftical censures, by 29 Charles II. c. o.

9 See the trial and examination of Sir John Oldcaftle

ollected by John Bale
on which occasion it was adjudged by Fleming, Tanfield, Williams, and Croke, that the Diocesan may convict of Heresy, and that there upon the writ "de hare-tico comburendo may issue."

12 Co. Rep. 92.

It is perhaps to be wished, that this statute had gone one step further, and taken from the spiritual arm every exercise of penal jurisdiction.

I have given this detail of historical facts, merely as a subject of curious speculation. The banners of pious cruelty seem now to be for ever laid aside. Philosophy and benevolence are become the companions of religion.

4. Still, however, and confidently both with reason and civil liberty, all intentional affronts to the national rites, and all manifest impleties vatintingly committed, are confidered as criminal, and in their nature subject to the secular cognizance: yet not as crimes immediately satal to society, and calling for the extirpation of the criminal; but as infractions of the public tranquillity and disturbances of the established system.

The English legislature is now aware, that it is not the office of the magistrate to stir up the zeal, and blow the coals of persecution; that severity ought not in any instance to be extended to the peaceable exercise of

different opinions; that the Law ought not to be made the scourge of conscience, nor compulsion to be added to intolerance. Misdirected piety is no longer within the province of our tribunals; though sometimes, from the principle of the civil establishment, properly subjected to certain civil disabilities.

"Hear this, ye nations;" and let not in any case the sacred truths of the Gospel be forced upon mankind by the contaminated hand of the executioner! let not in any case an unhappy attachment to hereditary religious errors, confirmed by the prejudices of education, be made a capital crime! The attempt to over-power by terrors the misappre-hensions of the mind is unnatural and presponderous. Uniformity in opinion cannot be the result of force; general orthodoxy cannot be the creature of mandatory Law; nor can "the pains of death in support of religion "ever have any effect but to destroy"."

§ 3. Is would be uncandid however not to confess, that the Laws of England at this day subject Popish Priests, in many cases, to

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L'Efprit des Loix.

perpetual imprisonment; in others, to the pains of high-treason. It is also high-treason a to perverted, to the see of Rome. A second refusal to take the old oath of Supremacy is liable to similar severity. Such Laws are rarely exerted; but their existence is a national reproach.

A free government may naturally hold in abhorrence a religion, the principles of which are founded in flavery; but a free government forgets its own principles, when it gives to involuntary opinion; the denomination and punishment of the most enormous guilt:

In that age of bigotted enthusiasm, when ecclesiastical tyranny was placed in competition with civil government; and when it was attempted, with impudent and unwearied diligence, to subject the internal Sovereignty of the realm to the supposed universality of the papal power; the indignation of our ancestors was at length awakened, and the unnatural position of "imperium in imperio" was encountered by many sharp and severe Laws. The motive hath ceased, but the effects res

t Stat. 27 Eliz. c. 2. v 3 Ja. I. c. 4. 23 Eliz. c. 1. v 5 Eliz. c. 1. § 11. H 2 main 1

main: and our flatute books are at this day crowded with inflictions of forfeiture, and perpetual imprisonment, funder the name of præmenires) on Papal provifors, importers of any Agnus Dei, croffes, beads, or other commodities of the church of Rome. Can it be a question, whether these laws ought also to be repealed? A free education that guarally hold in

§ 6. Sorcery, by the construction of the common Law, was a species of herefy . Under this idea, A. D. 1441, the writ de barreles comburendo was iffued against Margery Goodman of Eye in Suffolk, and the was accorded ingly burnt for confultation with the Devil. Witchcraft also was treated with extreme feverity in very early times: in Scotland 7. A. D. 840, a Law was made to punish it by cutting out the tongue; and in England, by

S CONTRACTOR

Mirror, c. 8 55.—Fleta. "Christiani apostatæ, sorti-legi, et bujusmed, combusi debent." The word "hu-jusmodi," which in this sentence seems of a very alarm-ing nature, is not more exceptionable than certain expressions, which frequently occur in the English statutes a such as "divers other like kinds of miserable offences."

"Any thing to the same effect." "Other offences of the like same, Se" We frequently had the same vague appendix in the Roman Law. "Aliudve quid simile si admisey Concil. Brit. p. 341.

the laws of Athelftan, A. D. 928, it was made a capital crime 2, We find a presentment of forcery inter placita Reg. Rich. I and in the Year Books there is an appeal of Necromancie in the 18th year of Edw. II. There are also many ancient writes in Rymer de fortilegis capiendis. It suited the sanguinary temper of Henry VIII, as well as the pedantry of James the First, to give written descriptions of this offence; we accordingly find very learned edicts against prophets, forcerers, feeders of evil spirits, charmers, and provokers to unlawful love . Sir Edward Coke thinks b, " that it would have been a great defect in government, to have fuffered fuch

² See also a Law temp. Hen. I, in Lambard, c. 71.
William of Neuburgh, who wrote A. D. 1181, gives a
yery grave account of a witch who obtained a victory at fea in favor of Suerus King of Normandy, by commanding the waves to fuck in the greatest part of the adverse fleet; "which was accordingly done." P. 236.

On the 23d of August, 1728, several persons were burnt alive at a town in Hungary, because a large woman, who had confederated with them in the art of witchcraft, did not, when put into the scale, weigh more than four

See the Roman Law " de his qui amatorium poculum dant." Plutarch also exclaims warmly against women using " The College or: Superforme of The next a specificat."

devilish abominations to pass with impunity." But the lawgivers of this generation have prohibited all profecutions of a crime which doth not appear to have any existence; and have by the same statute ordered all pretenders to fuch preternatural abilities to be exalted on the pillory above the rest of mankind. That knavery, which endeavours to impose on credulity, is surely a proper object of correction; for which reason also, false and pretended prophecies are properly punishable, though they are too frivolous in their nature to require any extraordinary severity. They were punished capitally by I F. VI. c. 12; which was repealed by Q. Mary: and now, by 5 Eliz. c. 15, the penalty for the first offence is a fine of 1001. and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment for life.

§ 7. It is not improper, under the title of this chapter, to confider crimes relative to marriage; which, though a civil institution, is stamped with the seal of religion.

c 9 Geo. II. c. 5.

Milivah

Incest

Incest d, and adultery e, are vices so contrary to the well-being of a great and polished state, that one may wonder at the supineness of the English Law, which hath not subjected either as crimes, in any instance, or in any degree, to the temporal cognizance. Adultery is perhaps punishable by indictment s, as a scandalous and public indecency; but in no case as the infraction of a sacred tie, and tending to a general dissoluteness of manners.

This offence among the Saxons was punished by a fine, called Lecherwite, and Legergeldum. And we find in the Domesday book, "quod adulterium faciens 8s 4d emendabit bomo, et famina tantundem: Rex babeat bominem adulterum, Archiepiscopus faminam." The Julian law of the Romans punished it also by fine;

d Tune soror nati, genetrixque vocabere fratsis, Nec quot confundas et jura et nomina sentis & Ovid. Metam.

where the distribution of the many to

The crime of incest was punished with great severity by the Roman Law. See Dig. xlviii. 5. 38. 2: And this severity was even extended to the mode of prosecution. De servis nulla quastio est in dominos, nisi de incestu. Cic. Qrat. pro Milone, c. 22.

e Oppida coperunt munire et condere leges, Ne quis fur effet, nen latro, nen quis adulter. Horat. f Comberbatch, 377. Tremaine's Pleas of the Crown,

p. 209, and p. 215. State Trials, vol. iii. p. 52.

the law of Moses s with death. Women committing adultery were by the Egyptians deprived of their nofes, that they might not again allure men to wantonness; but I cannot learn that male offenders were liable to any corporal penalty. The wife's transgresfion in this respect is certainly more repugnant to the end of marriage, than the husband's; vet the fex of lawgivers influences the modes of punishment, A female Legislature, however inclinable to eradicate this offence, would hardly have had recourse to mutilation, as the most eligible expedient for that purpose,

§ 8. Polygamy is in our Law a felonious offence b, but entitled to the benefit of Clergy: by the laws both of ancient and modern Sweden, as also by the laws of Denmark and of Spain, it is punished with death. It certainly

¹ Ja. I. c. 11. But it is provided by the third fection, " that if any person, divorced by any sentence of the ecclefishical court, shall marry again, the former husband or wife being alive, he or she shall not for such marriage be liable to the penalties of the statute." Yet such sen-tence of the ecclesissical court is no dissolution à vinculo matrimonii; the second marriage is merely void, and the bigamy is in its effects as offensive to the interest of so-elety in this case as in any other. The reason of this lanity is obvious, but unfatisfactory. For inflances, fee Sel. p. 27. 1 Cro. p. 461.

is a gross species of adultery, aggravated by the profanation of a religious rite; yet the law, which ought to look upon the individuals of the community with the eyes of a mother upon her children, ought to be very sparing of the highest severities, when the milder class of restrictions may suffice. In France it is punished by sentence to the gallies, or by temporary banishment.

By the ancient law of England, Christians marrying Jews were burnt i alive.

§ 9. It is made a felony by a late statute to solemnize clandestine marriages. The crime is indeed prejudicial in its consequences to the public police and economy: yet it might perhaps have been sufficient to have made all such marriages void, or to have subjected the offender to pecuniary forfeitures, or civil disabilities.

§ 10. Sacrilege formed a very extensive article in the Roman law, and was accounted

k 26 Geo. II. c. 33.

i I have transcribed this expression from Sir Ed. Coke, 3 Inst. 89, but in is evidently a mistake. "Contrabentes cum Judais, Judanbur, pecorantes, sedemite, vi-vi consodiantur." Fleta, L. i. c. 35.

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more odious than treason! The English statute-book draws no distinction of guilt from the holiness of the place, or persons offended; except in the crime of robbing a church, or chapel, which is excluded from the benefit of clergy by an act of Henry the Eighth; the fact however must be accompanied by an actual breaking m. By an Athenian law n, a man committing this offence was banished with all his children. It was also a maxim of the civil law, quod delista capiunt incrementa a loce, sive ratione loci in quo committuntur o. By the laws of King Canute p, "if murder be committed in a church, a full compensation shall be paid to Jesus Christ, another full compensation to the king, and a third to the relations of the

Proximum sacrilegio est quod Majestatis dicitur. L. i. ff. Leg. Jul.

Yet we are told that in the temple of Diana at Aricia near Rome, whoever killed the chief priest was entitled to become his successor; a most unaccountable privi-

Fanum in luco est, et perfuga, sacerdos ibi constituitur. qui sacerdotem sua trucidaverit manu; strictoque semper gladio paratus ad infultus propulsandos circumspicit. Strabon. Geogr. 1. v. p. 366.

Ecce suburbanæ templum nemorale Dianæ

Partaque per gladios regna nocente manu! Ovid. Art. Am. i. 159.

m 2 Hawk. 351, Meurfius, l. ii. c. 2. off. l. xvi. § 5. P Lambard's Collection, Law 2.

deceased." And in the 8th year of Edw. IV, it was attempted 9 to make facrilege high-treafon, subjecting the offender to be burnt. A petition, the common method of tendering bills for the royal affent, was presented to the king for that purpose by both houses. To this extraordinary request the king returned an answer, becoming the royal majesty of the crown, "Le Roy's avisera"."

CH A P. XH

with the communication regarded to the plants.

Of Crimes relative to the Law of Nations.

In The law of nations is founded partly on the fuggestions of natural equity, partly on positive stipulations. It is universal in its extent and operation through the civilized world; and supported by the general consciousness of its general Utility.

Individuals are required to give their acquiescence to this law, not as a matter of

9 Cotton, 684. + Foffer, p. 192.

choice.

choice, but of obligation; and it is the province of legislators to force that acquiescence, if kept back or neglected. For the faith of nations in their collective capacities would be of little avail; if private subjects were allowed to use hostilities and treachery towards each other; mutual diffrust, infecurity, discord, and war, would follow. Vim volumus extingui? jus valet necesse est . If the views of each individual were permitted to terminate in felfishness, the misery of all would be the confequence; the stability of a building depends on the united support of its corresponding parts.

This law becomes precise and definitive, in proportion to the continued intercourse of nationst, and the complication of their mutual connections. I am not however to confider those multifarious rules of equity, which have been tacitly established in the conduct of war and commerce; fuch as, declarations previous to hostilities, the prohibition of poifoned weapons, capitulations, fafety of hostages, suspensions of arms, maintenance of

molecula

Orat. pro Sext. c. 42.

2 Quam legemexteri nobis posuerunt, eandem illis ponemus.
Steirnhook, de jure Suconum, I. iii. c. 4.

truces, the privileges, regulations, and refitrictions of merchants. I confine myfelf merely to the penal cognizance of states internally respecting the rapaciousness and malice of Natives in their conduct towards Aliens. The crimes founded thereon are redutible to a small compass.

the bushed of walls it side barenessed

§ 2. Offenders against the rights and privileges of embassadors, by arresting their persons, or distraining their effects, are deemed violators of the Law of Nations; and, by a modern act, made liable to such possibles, or corporal punishment, at the Chancellor and the two Chief Justices shall think fit w: a strange, and unlimited discretionary power! abhorrent from the principles of a free government; unlikely indeed to be abused, but improper to be given. It would be easy to establish a less exceptionable fanction to that reverence which is due to the representative of kings. This Act is said to have

the state of the surface and the sale of

V Stat. 7 Ann. C. 12.

w The same indefinite legislative Authority, as to military punishment, is annually given to the King, by the Mutiny Act, which empowers "his Majesty, to form Articles of War, and constitute Courts-martial, to try any crimes by articles, and inslict such penalties as the articles direct." But this cannot be extended to affect life or limb. Commentaries, B. i. 415.

been made under mortifying circumstances, as a kind of public fatisfaction to the Czar Peter; whose embassador, Mateof, had been arrested in London for debt, and obliged to have recourse to the other foreign ministers to give bail for him. It feems hardly credible, that the characters of embaffadors should have wanted this fanction in England in the 18th century. Mr. Whitworth was also fent with a folemn apology to the Czar, in which he told him, fays Voltaire *, " that the Queen had imprisoned the persons; who had presumed to arrest his embassador, and that the delinquents had been rendered infamous;" affurances, which, if they ever existed, had certainly no foundation in fact.

\$ 3. Truce-breakers, and violators of fafe conduct, are by a statute of Henry the Fifth declared guilty of high-treason against the King's crown, and dignity. It feems to be the better opinion 2, that this was repealed by the subsequent statutes of Edward Sixth, and of Mary. The punishment was certainly extravagant; but the milder law of Henrythe Sixth relative to the same crime, which

x Hist. de Russ. c. 19. y 2 Hen. V. c. 6. z Commentaries, B. iv. p. 70. 31 H. VI. c. 4. ftill

ftill remains in force, is too vague and indeterminate.

Commercial countries naturally shew a peculiar tenderness to the persons and property of foreigners. "It is a beautiful circumstance, says Montesquieu, that the English nation made the protection of merchant strangers a principal article in the great charter of her liberties b": the most benevolent indulgence was also shewn by our law to the proprietors of distressed and wrecked vessels, at a very early period, when it was permitted

b There was a degree of national wisdom in the clause to which Montesquieu alludes, and which may be sound in 9 H. III, c. 30. It must however be acknowledged, that the internal Hospitality of England doth not appear to be of great Antiquity. I shall transcribe a part of the oath, which Bracton records, as necessary to be taken by all persons above sisten years of age: Jurabunt etiam, quod nullum de nocie recipient in domum suam ad bospitandum, nisi bene notus sit: et si forte ignotum aliquem bospitaverint, quod non permittent eum in crassino recedere ante clarum diem, et bec sub testimonio trium quatuor virorum."

L. iji. c. 3.

At the same time, it should be observed, that the latter part of this transcript relates merely to the police of the kingdom, which in the early periods of our history was extremely strict.

The hospitality of the ancient Germans was remarkable. "Quemcumque mortalium arcere tecto nesas habetur. Notum ignotumque, quantum ad jus hospitii, nemo discernit." Tacit, de M. G. c. 21.

mitted to other nations, in naufragorum miferia, et calamitate tanquam vultures ad predam currerec. This subject is certainly connected with the law of nations; but I shall only obferve further upon it, that it hath been thought necessary by a very modern act, to make all plunderers of diffressed or stranded ships guilty of felony without benefit of clergy. This act was indeed effentially necessary to infer criminality on the plunderer; fince Larceny could not at common law be committed of creasure trove or wreck, till feized by the King, or him who hath the franchise; for till fuch seizure e no one hath a determinate property therein.

If flealing furniture, above the value of twelve-pence, from lodgings, required the punishment of death is the plundering of wrecks, aggravated as it is by the unfeeling

It is faid in the " Observations on the ancient statutes" p. 22, that the Welsh Laws gave no protection to the Stranger. "Tres sunt bomines quibus multa non debetur pro injurid eis illată: 1. Furiosus, 2. Alienigena, 3. et Leprosus:" But I apprehend that the subsequent section had escaped the learned Writer's notice. " Pretium legitimum unicuique eorum competit, et is qui injuriam illis in-tulerit multa publica obnoxius erit." Leges Wall. p. 330.

Stiernhook, l. iii. c. 5.

d 26 Geo. Il. c. 19. Comment, B. iv. 234.

f 3 and 4 W. and M. e. o.

neglect of that facted respect which is due to the unfortunate, certainly is not entitled to mercy. But arguments from analogy lead to bloody consequences in the framing of penal laws. By the code of the Visigoths, he, who took the apportunity of fire or ship-wreck to steal goods, was obliged to restore fourfolds.

The above mentioned act bath made it a capital offence to put out false lights, with intention, to bring any ship into danger. The crime is undoubtedly beinous in its naveure, and may be decidful in its consequences; but the punishment of death should be inflicted rarely, and with great caution, upon the intention, where it is not followed by its liftedt. It was thought sufficient to punish the destroyer of stated sea-marks with a penalty of 100 s. or outlawry to

authorized depredation on the feas. The wars of nations are in all cases unhappy, but often degitimate, even when offensive; being founded in the principles of felf-preservation. For the life of nations resembles the life of

ban I man

man, and the right of felf-prefervation frequently induces the necessity of beginning the attack. It is not fo with freebooters and pirates, who are to be considered as unprovoked enemies, or rather as beafts of prey, to be hunted down by the universal concurrence of mankind.

This offence, by the common law of England, was a species of Treason, except when committed by aliens; but punishable only as fuch, when the act, if committed on land, would have amounted to a capital crime. The statute of treasons left it a capital felony only. The descriptions of it have been much extended by modern after of parliament; and it may be doubted, whether fome offences are not described therein, and punishable as piracies, which have no connection with our ideas of that offence to the Any commander or other feafaring person, betraying his trust and running away with any thip, boat, ordnance, ammunition, or goods, shall be adjudged a pirate : and the trading with pirates or in any wife corresponding, with them, and the forcibly boarding any merchant veffel: though without feizing and carrying her off,

i ii and is Wo His. 379 and 8 Geo. d. c. 247 d 3

and destroying or throwing any of the goods overboard," are all under these acts deemed proofs of Piracyment was a material and a

nom or visitely merellaris oppolitando, circoritore

The misapplication of terms in the framing of penal Laws is dangerous to liberty. And this confideration reminds me of another modern flatute k, which infers the guilt of high-treafon on all those, who shall knowingly make, or mend, or shall have in possession, any instrument proper only for the coinage of money.

Gum WATEST X hath for inchocant

The Laws of Henry the Eighth were not more prepofterous, when they gave the appellation of treason, to the stealing of cattle by Welfhmen, to the deflowering of his Majesty's Aunts and Nieces, and to the bare folicitation of the chaftity of his Daughter; nor the ancient law of Edmund, which made mere Fornication with a Nun punishable as homicide ladoni furnish did woles

for his converted matter along and the best for the k 8 and 9 W. III. c. 26. made perpetual by 7 Ann. c.

dam roy deins cest ley; s. Qui cum nunna vel sancti-moniali fornicetur, emendetur ficut homicida." Stille I - noine last for se Staundfort, p. 23. B,

It was well observed by Tacitus in regard to Augustus, " Qued culpain inter virus as farminas vulgatam, gravi nomine Lasarum religionum ac violata majestatis appellando, clementiam majorum, suasque ipse leges egrediebatur.

facute . Vizh inter the wife of high trea-

confider anon reminds in c of another neglera

Of Treasons.

AJESTY hath no prerogative against the arm of fate. But the personal protection of Majesty against the efforts of disloyalty is within the province of human forelight, and should be within the first fanctions of positive law.

closicitation of the challery of his Daughter:

Many are the fleepless hours which the Sovereign must undergo, infinite is the heart-ease which he must neglect, for the sake of his subjects. His preservation becomes in return the primary object of their care. And thus it is, that the reciprocal duries of protection and allegiance form the foundation, and support of the political union.—Justice watches, like a guardian angel, over the rest-

less pillow of her defender, for every blow, levelled at him, is, in its confequences, levelled at the whole give establishment. The general welfare of the people is blended in the safety of their common sather, and representative, nor can his life fall a sacrifice to conspiracy or faction, without involving the whole realing in popular invertexees, blood, and desolation.

Hence it follows, that high treason, which, in every instance, strikes ultimately at the well-being of sovereignty, is the foulest crime that can be committed; because it is of all crimes the most audacious in its nature, and the most extensively pernicious in its consequences. But the foulest instance of this crime is that, which aims directly at the royal person; because it is the most satal and most entire renunciation, of faith, duty, subjection, and allegance.

The pecultar jealousy of mankind on this point is such, that, in every known system of laws, the more imagination of the traitor, when evidenced by any external action, is ranked in the same degree of guilt, and subjected to the same degree of punishment, as the actual completion of the Treaton; not be-

Carrie

cause the idea is deemed equivalent to the perpetration of the fact; but because the serverest chastisement, within the possible dispensation of the lawgiver, is thought due to the malignity of the intent—" Edden severities voluntatem bujus sceleris, que effective puniri jura volucium "." Such were the words of the Roman Law, which did not suffer the crime of high treason to be extinguished even by the death of the criminal, but with an unjustifiable singularity extended the prosecution to his corpse, and the forseitures to his representatives and heirs.

c. of T committed , because it is of all crimes.

m Cod. ad leg. Jul. 1. ix. t. 8, 1. 5.

a Extinguitur crimen mortalitate, nifi forte quis majestatis sit reus: nam boe crimine, nisi successoribus purgetur, Hereditas sisco vindicatur. St. ad Leg. Jul. Maj. I. xi.

Alienationes, quas fraude vel jure aliquis fecerit, ex es tempere que de incunda factione cogitaverit, nullius effe momenti statuimus. Cod. ix. 8. 5.

Nam ex eo tempore quo bunc cogitationem subiit, propser cogitationem dignus est pænå. Cod. ad L. J. vi.

In Englandia person slain in open undoubted rebellion is not liable to any forfeiture; for the benevolence of our law always presumes the possibility of a defence known only to the criminal: and on the same principle, if even after conviction and judgment the offender should become insane, his execution shall be stayed; she were he of sound mind, he might perhaps alledge something in stay of the proceeding. The 33d of Henry the VIII. c. 20. directed, in cases of treason; the Lunaric to be tried and executed, "bis lunary anamadness not with standing." but this act was repealed.

The old laws of the Lombards punished as a Traitor if any Man, who should conceive a thought against the foul of the King of the fame Laws pomished the marriage of any woman, that had taken a religious habit, Hevery fuch woman being precontracted as the spoule of God," The pruriency of a fin gurative imagination ought not to be indulged in the composition of penal laws; poetical license in the description of crimes leads to sanguinary confequences.

The last observation is in some degree applicable to the statute of Edward the third, which is at this day, the standard measure to the people of their duty to the Sovereign, The first clause of that statute is in the following words, "When a man doth compass or imagine the death of our Lord the King, of Madam his Companion (confort), or of their eldeft fon and heir." This was declaratory of the Common Law of the realing

the graduer of chatriexcellens parliament to

repealed. There is good sense on this point in the Grand Coustumier: "Si aliquis extra menten constitution sad dementia aliquem interferent aut mebaigma veris, perpet tuo carceri ost mancipandum." fol. 13.

o Siquit contra animam regis eggipe verit. ed blunch 11. p Book il. tit. 577 at goines, colour to except larev

which might have been copied with better precision from the words of Bracton q in Si quis aufu temerario machinatus fit in mortem domini regis. The word "compaffeth" in the ftal tute was probably berrowed from Britton yor from the editor of the Myrror, who wrote in the time of Edward the First, about forty years after Bracton. The other word "little gineth" feems first to have inadvertently received this harth application from the Parliament of Edward the Third; but it was not the temper of that excellent parliament, to leave the confirmation of frich words vague, and indeterminate; and Nuccordingly require ed, that " the criminal mould be steadated, upon full proof of an open deed, by people of his The first clause of that flattle" nothing wing words, "When a man doth compais

or imagine the death of our Lord the King,

Grand treson est de compasser notre mort." Brit. troit manieres. 1. per ceux que occident le roy que compafient de faire. 2. per ceux que luy desheritent del
royalme per trahissent un host, ou compassent de le faire.
3. per ceux avouterors que spargissent le semme le roy,
le sile le roy eignesse le gruime, avant ceu que elle sont
mary, en la garde le roy; ou la nesce le etant le heire le
roy. Mirror, c. 1. § 4.

It should be observed, that, in this account of the se-A ? Provablement," this word is by the editors of the flatutes inadvertently rendered probably," notwithfland-

It is then, and it hath ever been, the law of England, to punish a mere intention and still the king, more feverely than the actual and most wilful murder of a private subject; but the guilt commences only, when fome meafure? thall appear to have been taken to effectuate the guilty purpose. A mere concealment of a traiterous confederacy will not with us, as among the Romans , amount to treason, There must be alledged, and proved, some act declaratory of the intention, some positive participation in the guilt, fome confultation, perfusion, or means of incitement. Advice given in a treason merely incheate, and never executed, will make the adviser a principal in the treason, A sending of letters, or a

ing the caution of Sir Edw. Coke. " The adverb " pro-" bubly" (saith he) hath a great force, and fignifieth a direct and plain proof: which word the King, Lords and Commons did use, for that the Offence was so

"heinous, and wie so heavily and severely punished, as "none other the like. Note, the word is not "probable" by," for then commune argumentum might have served." 3 Infl. 12.

"Foster, p. 195. I Hale's P. C. 119. Kel. 17.

"Vi" Id qued de pradictis reis majestaris, etiam de satellitibus, consciss, ac ministris corum cadem severitate dicimus." L. vi. Cod. ad Leg. Jul. Even the wife on this point was oblighed to between her husband. Non this point was obliged to betray her hushand, Nov. cxvii c. 8.

w But it seems to be an indefinite and therefore dangerous position, that " if any one do any thing by which be " sheweth his liking and approbation to the traiterous design, this is in him High Treason." Kelyng, p. 12.

preparation of weapons, or poison, in contemplation of the crime; treasonable printing or writing with publication or unpublished writings, if relative to the practices charged in the indictment; words explanatory of an act, or spoken in prosecution of a traiterous purpose, are all matters of proper, and competent evidence, to be offered in proof. But the open deed, to be shewn at the trial, must be specifically, and correctly charged in the indictment, that the person accused may be prepared to refute, explain, or defend it, And an open deed, not fo charged, cannot be given in evidence, unless it conduce to prove one that is y fo. This rule, in cases of treas fon, is founded on a positive provision; but it hath ever been the wife and equitable practice of our courts, in other criminal profecutions, to reject all manner of evidence, unconnected with the point in iffue. A multiplicity of diffinct and independent facts, however tending to the fame inference, might infenfibly confound the attention of the person acculed, baffle the plan of his defence, and influence the disposition of his judges.

· Mana

the of debations of being indeed it will to Foster, p. 200. ob a sound a made motion quero

⁷ State Trials, vol. v. p. 22. Das gaital and de la and a printer the dear of dans and a strade and But

But there are other open deeds of a more explicit kind, which come within the idea of compassing the King's death, though in themfelves (and under express statutes so described) diffinct species of treason, and liable, as such to be charged and proved. Thus, levying of war , and, under certain limitations confpiring to levy war; concerting with foreigners and others in order to an invalion of the kingdom ; entering into measures for depoling the Sovereign; may always, and in fome cases must be charged, as overt acts of compassing. Again, the actual murder of the King operates in legal evidence, only as an overt act to prove the compassing of his death c. To the same purpose may be shewn an overt act of conspiracy to imprison the King, or to reftrain his person by force. Here the law prefumes, that when respect is so far forgotten, the more facred duties of allegiance will foon be obliterated in blood;

Pofter, p. 213, radien , ratione b Habis Sit or This was the case of Cardinal Pole, who was said to have written a book for that purpose to the Emperor Charles. Co. P. C. p. 19.

with the kingdom, cannot possibly be brought within any other clause of the flatute; nor will a mere conspirately to levy war amount to treason, unless particularly pointed against the person of the King, or bis government, c Kelyng, p. 8, The case of the Regicides. r Hawk.

ne bil del Ben il e po

and history proves, that pritons are generally the Haughter-houles of Princes. The mstance of a Moharch, conducted to the scarfold after air the folemany of a trial and judgment, in the open day, in the prefence of Tilly people, with all the apparatus and parallel, games of a penal execution, is without a reigners and others in order to an invalion of

9 1. The record species of treaton in this fratute ist " toben a man with ololate the Wing's confort, of bis elligt dangbree unmarried y or "the wife of his eletest for and bein " Violation of Here implies a tambal knowledge by whatever means obtained, and is made a treas for able act for very tond, talisfactory, and evident reasons. There are certainly mace curacies in the wording of the Clause & But perhaps they are shmaterial. The wife of the fecond fon is not within the statute, though her liftue is infleritable in preference to the eldest daughter; neither doth it feem treafon to violate the eldeft daughter, that hath been married, such violation not being

of his lord, was in the feudal law subjected to a forfeig ture. "Si vafallus feceris felonium dominum forte tucurbi-

Hale's Hift. P. C. 1. 129.

Fend. I. ii. t. 38. Brit. I. i. c. 22.

within the letter of the feature, though within in the reason. The common day journded the fame fanction to all the daughters fast ni

confraction of can inadvertent exercitions

In the confirmation of the last-mentioned claufe, it hath been the unanimous inference of all the writers on the English laws, that if both the parties be confenting, they are "equally guilty of treason," consequently, that a Queen confort committing adultery committeeh treason; and the cases of Queen Ann Boleyne, and of Catharine Howard, are referred to, as the grounds of this opinion.

I submit with great diffidence, that a different conclusion ought to have resulted from each of those cases. Anne Boleyne's judges would very chearfully have given the appel-

transfer was now made ut of to tie-

Coke, Inft. iii. 2. Hale's Hift. P. C. 1. 124 Commentaries, B. iv. Size vanded mortistics, periodican

This idea, which certainly is not warranted by the words " if a man doth violate," & feems to have arifen from the manuscript report of Judge Spelman " of " matters relative to the trial of Anne Boleyne," which, I believe, is now lost. Sir R. Coke professedly founds his opinion thereon; and Bishop Burnet, who wrote his account from Spelman, observes, that "there would " have been no need of firetching the other statute, if " they could have proved the violating the Queen; for " then the known statute 25 Rd. III. would have been " fusficient."

The territory and the period par and an

entrality of

lation of burglary, piracy, or horse-stealing, to the crime of which the was accused; but, in fact, the was executed under the strained construction of an inadvertent expression s. She was proved to have faid to her fervants. " that the King never had her heart," which was charged to be flanderous to the iffue begotten between the King and her. She was convicted therefore on a statute made two years before, declaring it treason to throw flander on the King, Queen, or their iffue. so So that, faith Bishop Burnet, the law that " was made for her, and the iffue of her " marriage, was now made use of to de-"ftroy her b." An act of parliament was mon bacicles are les riene noticianes afform

25 H, VIII c. 22. § 8. Bishop Burnet, vol. i. p. 202. And Hume's Hist, vol. iii. p. 207. Stow 557. Hall 227.

h "In her, faith Lord Herbert, were eminent the most attractive perfections. Beauty indeed is not always the best keeper of itself; yet she was thought both moderate in her desires, and of discretion enough, to make her capable of being trusted with her own perfections. I do reject all those therefore that would speak against her honour, in those times they staid in France; but I shall as little accuse her in this particular of her affairs in this time; it is enough that the law hath condemnsed her. No cause hereof is related yet, unless that at a tournament she let fall a handkerchief, wherewith some one, supposed to be her favourite, wiped his face; and that this was perceived by the King. But suspicion in great minds is like a tempest, which, though it

foon afterwards made to declare her marriage to have been unlawful, " for that his Pligh-" ness had chosen to wife the virtuous and excellent Lady Jane; who, for her con-" venient years, excellent beautye, and pure-" neffe of flesshe and bloude, would be apt, "God willinge, to conceive iffue by his " Highnesse." As to Catharine Howard, the was beheaded under an express statute of attainder , upon petition of both houses of parliament to the King, " that he would not " vex himself, but give his royal affent to "what they should do." Her grandmother the Duchess of Norfolk, with twelve persons more, was at the fame time attainted of mifprision, for having concealed her vicious life, which they were supposed to have known previous to her marriage. The fame act required k all, who hereafter should know, or ent column in his loft. To the

ampallet of the convey he made arribance

[&]quot;fearce stir low and shallow waters, when it meets with
"a sea, both vexes it, and makes it toss all that come
"thereon. The Archbishop of Canterbury, in a conso"latory letter to the King, wrote as much in her behalf
"as he durst. The King solemnized his intended mar"riage three days after her death, not thinking it fit to

[&]quot;mourn long for one the law had declared criminal." Hift of Hen. VIII. p. 285, and 440.

Stat. 33 H. VIII. c. 24. Herbert, p. 538.

k But not under the pains of high treason, as misconceived by Mr. Hume, vol. iii. p. 248; or under any other penalty:

vehemently prefume, any condition of lightness of body in her which should be Queen, to disclose it to the King, or Council; at the same time "prohibiting every one to blow it "abroad, or whisper it to others."

The ingenuity of this parliament went further; for they not only made it treason in the Queen to have committed an act of incontinency, prior to the marriage, without previously revealing it, but they extended the same guilt to all concealers of that incontinency; and also made it treason in the Queen to make advances of gallantry after marriage, by writing, words, tokens, or otherwise, though not followed by any effect.

It is somewhere well observed in regard to Henry the Eighth, that he never spared man in his wrath, nor woman in his lust. To the impulse of such motives we must attribute, that endless variety of sanguinary laws which

penalty: the clause was merely a permissive protection to the informer, against the words of the statute, under which Anne Boleyne had suffered,

All these provisions are in the same flatute; the enactors cannot be presumed to have retained any remains of shame; yet it is observable, that it was not entered on the roll.

Syswa by Mr Huine, vol. iii, p. 248 . or under any oring

were framed during his reign in opposition to all the influences of natural affection; the ties of confidence, and the fentiments of shame and decency because some one sew anothers

dard of the as Hew III. The passive pliability of parliaments in that age was wonderful. Henry was hardly cold in his grave, when the Protector, Somerfet, in order to engage the short-lived approbation of the people, obtained the repealing flat. Edw. VI. c. rz. which recites in the preamble, " that it had been necessary in the " time of the late King to make many laws, "which might appear to men of exteriour " realms, and to many of his Majesty's sub-" jects, very strait, fore, extreme, and ter-" rible; though they had not been without " great confideration, and policy, moved and " established. But, as in tempest, or winter, "one course and garment is convenient, in " calmer warm weather a more liberal case, " or lighter garment, fo, &c." son i slaubivibut

chimi, or in perhinor a particular redicts, In like manner the I Mary, c. 1. recites, " that many laws bad been made; by which even learned and expert people, minding benefty, are oftentimes trapped and fnared, therefore, &c."

compail

Thus all these forced, and strange effects of Henry's invention were abrogated by the first acts of his children , and the doctrine of treasons was once more reduced to the standard of the 25 Edw. III.

The next treaton, mentioned in that flatter, is of a more outrageous nature, and tending more immediately to break all the bands of government. Linear "the levying of war against the King in his realm." Under this description, a mere conspiracy to levy war, unless directly against the King is not treaton; but in a conspiracy for more remote purposes, if war be actually levied by some of the conspiracors, they are all considered as principal traitors.

The words of the statute seem to imply a military assemblage, or armed insurrection; not upon a private quarrel between powerful individuals; not in maintenance of a personal claim, or in pursuit of a particular redress; but such a rising, as may, in judgment of law, be intended to have been against the person of the King, to seize, dethrone, or imprison him; or to oblige him by violence, to alter the measures of his government; or to compel

compel a change in the religion fettled by law; or to withhold caftles or forcreffes by weapons offensive and invasive; or lastly, a wilful joining with open rebels, in which case force is no excuse, unless applied immediately against the person, or exciting instant fear of death. For if the fear of having houses burnt, or goods spoiled, or of other collateral injury, were a fufficient plea, it might be in the power of any leader to indemnify all his followers m. And this pretext of personal apprehension is most strictly construed; for st the trial of Axtel, who commanded the guards at the execution of King Charles, when he alledged in justification, " that he had acted only as a foldier, and under the command of his superior officer, whom he must obey or die;" it was answered by the court, that " where the command is traiterous, there the obedience to that command is also traiterous "."

It is not for private subjects, misguided perhaps by ignorance, and heared by faction, to determine the proper moment of resistance against supposed violations of fundamental

m Macgrowther's case. State Trials, vol. viii. p. 56.

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laws, subversions of the constitution, and breaches of the original contract restaurant

response offensive and invalve of lafty a

For never yet did Insurrection want
Such water-colours to impaint her cause,
Nor moody beggars starving for a time.
Of pell-mell havock and confusion o.

The infatuated misconduct of princes may certainly induce a crisis, in which the rising of the nation, as one man, is not only justifiable, but laudable, and glorious; but fuch a criss is to be decided by the united voice of the Society at large, not by the partial diffonance of clamorous Individuals. One may admire the courage, but it would be difficult to justify the conduct, of Flavius the Tribune, fo finely recorded by Tacitus P: Dein postquam urgebatur, confessionis gloriam amplexus, interrogatusque de Nerone, quibus causis ad oblivionem sacramenti processisset : " Oderam te, inquit; nec quifquam tibs fidelior " militum fuit, dum amari meruifti. Odisse " capi, postquam parricida matris et uxoris. " auriga, et biftrio, et incendiaris, uxetifti." Had the attempt of Flavins fucceeded, he would have deferred to be treated as a trai-

o Shakespear. P Tacit. Annal. 1, xv. c. 67.

waller tive flattate.

terous affaffin. For though the character of Nero was undoubtedly most detestable; yet the person of the prince is in no case liable to chastisement from the hand of a private subject. Dreadful indeed would be the condition of Sovereignty, if a contrary doctrine were tolerated.

It feems, on the whole, to have been the fole object of this clause, to suppress, and punish the daring efforts of positive rebellion against the administration of government, or the person of majesty; and this description might, in strictness, be thought to comprize every possible case, within this species of treason. But the idea hath, in the course of years, been extended with great liberality of interpretation.

A rising with intention to kill one of the privy council?; a tumultuary combination to compel the King to put away his ministers; an armed force with a general purport to deftory inclosures, to deliver prisons, or to demolish bawdy houses, or to pull down meeting houses of differents, (in which cases the uni-

⁹ Talbot's cafe, 17. R. II. FEarl of Effex's cafe.
6 Old Bailey Trials, 1688. Hale's Hift. P. C. i. 134.

K 3 verfality

versality of the design is construed into rebellion; lastly, insurrections to effect redress or innovation of public and general concern, in which the insurgents have no special interest "; " or forcibly to render ineffectual any act of "parliament, or law of the realm;" are all severally adjudged to be a levying of war within the statute.

The recital of this last very general head of construction will naturally bring to the reader's recollection one of the articles of the mutiny act; which receives the annual fanction of parliament, and makes "the disobedience of legal orders punishable by death." Such precarious, indefineable classes of crimes, bave a nacessary tendency to destroy the considered of the subject, and to give an arbitrary power to the Judge.

As to the other enormities above-mentioned, the constitution hath certainly intrusted the first, and proper exertion for the redress of grievances to the high court of parliament; yet to the eye of humanity it will appear doubtful, whether cettain offences have not

Pofter, 213.

villeliar.

occasionally received the hard denomination of rebellion, which might more properly have been punished as trespasses, misdemeanors, and riots.

Come weekly acres on yours before wheaver

It is by no means the temper of modern Judges to encourage arguments of implication to the extension of penal laws; I shall transcribe the concurring sentiment of the learned and benevolent Sir M. Hale, with particular regret in this instance, that his manuscript we remained so long unpublished.

crewle con at him to not ifemual according

"We must acquiesce in resolutions when "made and settled: but in my opinion, if "new cases happen for the future, that have "not an express resolution in point, nor are express quitbin the words of the 25th E. III. "though they may seem to have a parity of "reason, it is the safest way, and most agreeable to the wisdom of that great act, "first to consult the parliament, and have their declaration; and to be very wary in multiplying constructive, and inserpress tative treasons; for we know not cover it may end,"

Hin. P. C.

§ 4. The flatute proceeds to describe that fourth species of treason, which consists in " adherence to the king's enemies." The description of this offence had been in the same words near 200 years before, whenever any Norman quitted for France the allegiance due to England; and the style of forfeitures under King John was, "quia adhafit inimicis nostris in Normannia? ed and becauseously McHilly will

By "enemies" are meant " all aliens in notorious hostility." The solemnity of a previous denunciation of war is not always necessary x, as in the instance of general letters of marque and reprifals; and fometimes it is impossible, as in the emergency of a fudden invalion. That the persons adhered to were enemies, is a matter of fact proper to be averred, and evidenced by its public notoriety. agreeable to the wildon

Furnishing money, arms, ammunition, and provisions, or fending intelligence to the king's enemies, are all in reason, and consequently in law, acts of adherence; even though they should be intercepted in their

Bynkershoek, Quest Juris Publici, p. 1. et seq.

passage , for the treason, though ineffective, is complete on the part of the traitor.

A subject of the enemy-country, continuing under the protection of England, and practising, whilst in England, to the aid and assistance of that enemy-country, comes under the words of the statute; but mere residence in a hostile kingdom is not in itself an adherence, though a refusal to return to the mother country upon proclamation may be evidence thereof,

Other acts of adherence are, actual war against the king's allies, the treacherous surrendering in collusion with the enemy of a place of defence, a voluntary oath of fealty to the enemy king, or cruizing under his commission, though without any absolute act of hostility 2,

§ 5. To a speculative mind, unbiassed by the habitual warpings of positive law, I may now appear to have considered all the treasons, which can exist, as mediately or immediately

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relative

y Gregg's case, A. D. 1707.—See Burnet's History. and Dr. Hensy's case in B. R. 31 Geo. II.—Foster, 218. 2 State Trials, vol. v. p 22.8 W. III. Trial of Capt. Vaughan, who was executed for this offence.

relative to the person of Majesty, and the safety of the realm. But, disgusting as the task is, it seems necessary to make some mention of a great variety of other delinquencies, which by the statute of Edward the Third, and by subsequent acts of parliament, have been branded with the hard denomination and heavy penalties of high-treason.

It was consistent with the scholastic subtlety of some, and the credulity of others of our ancestors, to argue and to believe, that a missapplication of the royal prerogative by a subject amounted in guilt to an usurpation of sovereignty; and that an abuse of the king's image, though merely with a view to private gain, ought to be considered as the most traiterous disassection to the person of Majesty.

On these principles the statute proceeded to make it treason "to counterfeit the king's great or privy seal, or the king's money; or to bring counterfeit money into the realm, knowing it to be false." Nor doth this pro-

The extravagance of this idea among the Romans was fuch, that Severus and Antonius found it necessary by Rescript to declare, "that if a Person in throwing a stone should by chance strike one of the Emperor's Statues, he should not, on that account, be stable to prosecution for Treason." If, I. v. ad Leg. Jul.

vision appear to have laid dormant; for we find frequent mention of its effects in the writers of that age; and on one occasion in the fubsequent reign, before Belknap, Skipwith and others, apud Lincoln, " Septem fulfarii moneta tracti fuerunt, et suspensi; et quidam Vicarius de Wintringbam elmutescens adjudicatus erat ad panam Mutorum."

Laber Englands til dabensaler of, ou

But still the offences of elipping, filing, lightening, and impairing, were not expressly described; yet they were found equally pernicious to trade, and equally affronts to the image of fovereignty, though not fuch immediate usurpations of its attributes. To letthe the doubt therefore, and not merely as a new low, all fuch diminutions were declared to be high-treason . And indeed clipping seems to have been a crime of a very ferious nature, prior even to the statute of treasure; for we find the following remark, fo early as the year 1728, "Judei pro tonfurd, moor laye in he leston; say intruduced

and f

b Knyghton's Hift. A. D. 1389

c 3 Hen. V. c. 6. which flatute bath not been remarked by modern writers, who date the penalty of treason for the offence of impairing the coin from flat. 5 Eliz. 8.—

The answer on the Rolls given by Henry the Fifth is, "Quant à le loture, tonsure, et fillage, soit il declaré pur trefon."

PRINCIPLES . I 40

ueta in magna multitudine ubique per Angliam suspenduntur de " de fire sai ho noire seus ende beit hall

sat hi another of the too bas page sale to see

This, with other intermediate treasons, was repealed, and revived alternately, during a long course of years. At present, by the aid of many modern statutes, in which the accuracy and ingenuity of description seem to have engaged all the anxiety of the enactors, it forms a very confiderable article in our laws; and frequently puzzles all the efforts of mercy. to fave the wretches, who become liable to its penalties, morths whence here tobart or-sucions and dold and observer through the to sugarni

It is now high-treason, to have in possesfion any instrument, or tool, " not of common use in any trade," but proper only for Coining . With almost equal propriety it might be called homicide to be in possession of a piftoly to exceed the contract of the

for see that the bollowing that and to early It is also high-treason, " to make, or mend, or have in possession, any instrument," or cutting-engine, for cutting round blanks by force of a screw, out of flatted bars of gold, silver, or other metal: I have copied the words of the

d Thom. Walfingham, Hypodign. Neuft. p. 69.

that there are also many offences, relative to the coin, in the nature of felonies and mission meanors; and it is much to be regretted, that the several statutes on this subject are not all reduced into one act, who down the on and

I shall only add, that, by the last act on this subject, "the alteration of a farthing with intention to make it pass for a surpence, is high-treason in the offender, his aiders, and abettors."

The idea of what Bodin affectedly calls, the harmonious proportion of punishments, should never be forgotten in acts of penal legislation. It is merciless and absurd, to impute the same guilt, and give the same chastisement, to the leader of a rebellion, and the diminisher of a piece of money.

This extravagant idea seems to have existed in the common law of England; and probably derived its origin from the law of the Romans. Cudende pecunia obnoxii Majestatis crimen admittunt, et omni dilatione remota Flammarum exustionibus mancipentur 5:" and

f 16 Geo. II. & Cod. ix 24. 2.

ALATIA.

again, of Quicumque nummos aureos partin ringerine, parties finnerine, web raferine, A quidem liberi funt, ad bestias dari, si servi Amma Supplicio affici dedent." Such were the expressions of Theodosius and Justinian but no early authority can justify the conquences of their import, which will be best described in the words of an eloquent and humand modern writer. This confounds the diffraction and proportion of offences; and by affixing the fame ideas of guilt " upon the man who coins a leaden groat, " and him who affaffinates his fovereign. takes off from that horror, which ought to attend the very mention of the crime of high-treafon, and makes it familiar to the louislation. It is mercilely and insidusting infpine the famor guilly and give the fame

In France also this crime is confidered as a fpecies of treason, and hibjected to capital punishment by an edict, A. D. 1726; it was formerly treated with greater mildness, as we learn by the following law promulgated by Childebert III. A. D. 744 b; " de falfa moneta jubemus, ut qui eam percussiffe comprobatus fuerit, manus et amputetur ; et qui boc confensit, si liber

est, sexaginta solides compenat of services sexaginta istus evcipiat desso yes sido e si romoq resus e to colo entres that the colored succession si

for the last kind of treason, declared in stan as Edw III, relates to the actual killing of certain magistrates in the execution of their offices. Reverence and security are certainly due to the dispensers of public justice; but it may be doubted, whether they are so immediately the representatives of so vereignty, as to make the crime of killing them, however aggravated in its nature, lose its proper name of murder.

§ 7. All the treasons created between this statute, and the first of Mary, were repealed in the commencement of her reign; together with all selonies and pramunires enacted under Henry the Eighth.

But the struggles and jealousies attending the first progress of the Reformation, introduced under Q. Elizabeth a new species of treasons; of which, after various alterations, many exceptionable instances are still existing.

Chilbrenenc

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The second offence of extolling the Pope's power is at this day treason; upon which it is obvious to observe, that the idea of a treason, arising from a repetition of the offence, is in itself an absurdity. It is also treason, to obtain, or publish, or put in execution, within the British dominions, a Popish Bull of absolution, or reconciliation, or to withdraw, or be willingly withdrawn to the Popish religion; or to receive Popish orders; or to refuse a second tender of the oath. I have already observed, how repugnant it is to reason, religion, and humanity, to extend the infliction of death to the irresistible dictates of conscience, and belief.

§ 8. It will be sufficient to refer to our statute books for the particulars of another modern species of high-treason, the possibility of which seems soon likely to expire; and the necessity of which, as a civil sanction, is already sunk, in the united and affectionate attachment of the whole realm to the illustrious family of its present Sovereign. But the missiercted, and dangerous zeal of political enthusiasts, made it expedient, in the esta-

i 5 Eliz. stat. 2. Sav. 46. k 13 Eliz. c. 2. blishment

bliffiment of the Protestant succession, to affix the highest civil guilt to every overt act, by writing, or otherwise in opposition to that establishment; to every denial of the power of parliament to limit the succession; and to every moder of correspondence with the abdicated prince; or his children is the abdicated prince; or his children is

To these wise severities of our accestors we are in some degree indebted for the inheritance of those rights, of which we boast the present enjoyment. The industion of their venerable example, in the unimpaired transmission of those rights to our posterity, is a duty, to which we are called by the united the voice of civil and teligious liberty.

justice and necessity, examined the crims of justice and necessity, examined the crims of high-treason, both as actually considered by the positive laws of different countries, and as it ought to have been considered by those laws; I shall endeavour to pursue the same method as to the degrees of punishment, which have been, and which ought to be adapted to it.

of See 1 Ann. flat. 2. c. 17. and flat. 6 Ann. c.7.

Here we have a melancholy instance, how much the recollection of humanity may be infenfibly stifled in the warmth and refent ments of felf-love. The crime, being perfonally and immediately against lawgivers and legislation, hath engaged the full exertion of ingenuity and power, to make its punifitment as immoderate, and as complicated as possible a to country of the said of

we are in some decree indebted for the

It would be a painful tafk, to describe the executions of Ravaillac, and of Damiens ! neither is it necessary to refer to the executive justice of foreign nations. I shall confine myfelf on this point to the practice of England, which cannot be flated better than by an extract from the authoritative, and nervous description of Sir Edward Coke. who, with great profusion of learning, and a total want of common benevolence " enters into the following discussion in the bresence and hearing of feven unhappy men,

A MARKINE

m Those who are anxious to apologize for Sir Ed-ward Coke, will say, that the crime, of which those men flood accused, was perhaps the most horrid that ever entered into the heart of man: this apology might have some weight, if his harangue had been rather after conviction than before. odwer a Ann Anthony or or and the Shines of who

who were about to undergo this fehrence full of horrors.

"These traitors have exceeded all others their predecessors in mischies, yet his majesty in his admirable elemency and moderation will not invent any new tortures or terments for them; but hath been graciously pleased to afford them as well an ordinary course of trial, as an ordinary punishment much inferior to their offence:

And surely worthy of observation is the treatment by law provided and appointed for high-treason.

For first, the traitor shall be drawn to the place of execution, as not being worthy any more to tread upon the face of the earth, whereof he was made; and with his head declining downwards, and as hear the ground as may be, being thought unfit to take the benefit of the common air.

He shall next be hanged up by the neck between heaven and earth, as deemed unworthy of both or either, as likewise that

^{*} State Trials, vol. i. p. 235: judemients

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" the eyes of men may behold, and their " hearts contemn him. Then is he to be " cut down alive, and to have his parts of " generation cut off, and burnt before his face, as being unworthily begotten, and " unfit to leave any race after him. His " inlayed parts shall be also taken out, and " burnt; for it was his heart, which har-" boured such horrible treason. His head " shall be cut off, which imagined the mif-" chief; and laftly, his body thall be quar-" tered, and the quarters fet up in forme " high and eminent place, to the view " and detestation of men, and to become " a prey for the fowls of the air. And this " is the reward due to traitors ; for it is the " physic of government, to let out corrupt ". blood." thy any more to tread and

It hath been affirmed both with respect to nations and individuals, that, the sentiments of benevolence bear a general proportion to the progress of science; but the name of Sir Edward Coke will not be cited in support of this observation. With great acuteness and depth of learning, he retained through life a hard, unpitying nature; that brutal insolence which is so often produced in narrow minds, by

" the carely whereof he was made; and will

by undeferved or unexpected prosperity, marked all his actions. His learning, indeed. was not of that kind which we call litere bumaniores; but it would be an inference, highly injurious to the profession, to suppose, that the practice of law blunts the fentibility of the mind.

As to the punishment inflicted by our law on high-treason, which occasioned this digreffion; it appears formerly to have been a part of the judgment o, that the convict should be drawn upon a hurdle; but an instance is recorded P, in which Shard, Juffice, ordered, that nothing should be brought, whereupon he should be drawn, " mes que fans cley, on autre chofe a defouth lui, foit tray de chivauns bors de la sale, ou il avoit judgment, tanque a les fures, &c." It was also a part of the ancient judgment 4, " que les privies membres soiens excifes de fon corps, et comburés deins fon vieu :" but this was omitted by Lord Hardwick in the

O Steunford, L. iii. c. 19. p. 182. It is remarkable, however, that before the time of Henry VII. there were hardly two judgments, of which the form was the fame. See Carthew's Reports, p. 349. Walcot's cafe, p. Aff. xxxiii. 7. Hale's Hiff, P. C. ii 382.

9 Staunford, iii. 19.

judgments passed upon the four Lords in the year 1746'; and in a former case had been thought unnecessary. Still, however, the criminal must be ordered to be cut down alive. For upon a writ of error, to reverle an attainder in the 8th of W. III. it was affigned for error, that the court had only directed, " quod in-" teriora sua extra ventrem suum capiantur, et " in ignem ponantur," omitting, " ipfo vivente," or, " in conspectu ejus;" and it was said by Lord Chief Justice Holt, that " though this omission be for the benefit of the party at-" tainted, yet still it is error; for the judg-" ment in all capital cases is stated and settled by the common law, which no court can alter." The attainder was thereupon reversed, and the reversal was affirmed in parliament ".

It is certain, that the crime of high-treason is often of fuch a tendency as to require the ultimum supplicium, or, in other words, the extirpation of the criminal.

But when we are conftrained to have recourse to that fatal extremity, it should always

r State Trials, vol ix. . Lord Raymond, p. r.

Walcot's cafe, 12 Mod. 95, 96.

Mich. 11 W. III. Shower's Parl. Cafes, p. 127.

be observed, that whatever exceeds simple death is mere cruelty. Every ftep beyond is a trace of ancient barbarity, tending only to distract the attention of the spectators, and to leffen the folenmity of the example. There is no fuch thing as vindictive justice; the idea is shocking. Public utility is the measure of human punishments; and that utility is proportionate to the efficacy of the example. But whenever the horror of the crime is loft in fympathy with the superfluous sufferings of the criminal, the example lofes its efficacy, and the law its reverence.

A nation, familiarized and reconciled to the execution of the English sentence in cases of high-treason, would probably consist of a pufillanimous and despicable people; cruelty and cowardice are inseparable.

C H A P. XV.

A Digreshon relative to the English Trials in Cases of High-Treason.

5 1. T Ought not to difmis this subject. without remarking a very pleafing part of the English law relative to high-treason; L4

as founded in humanity, animated by the spirit of freedom, and perfected by all the powers of limited wildom, hedged toronte to saist a

From the affectionate temper of the nations great warmth hath been shewn against the crime of difloyalty, both in the liberality of its construction, and in the severity of its punishment; but the whole attention of the legislature hath at the same time been exerted, to obviate all possibility of oppression in the profecution, and all defect of certainty in the proof. Infinitely various have been the amendments, refinements, and alterations to this purpose; and, upon the whole, the following cautionary provisions have been thought sufficient, and are at this day in force;

No person shall be prosecuted for hightreason, except on a charge of w assassination defigned or attempted on the body of the King, unless he be indicted thereof within three years after the offence committed. It had been observed by Sir Ed. Coke, near a century before this provision took place, " that there wanted nothing to the perfecw 7 W. 111. c, 3. 4 6.

tion of the statute of the 25th Ed. III but a limitation of some certain time, wherein the offender should be accused." And such had been the idea of Bracton; " Post intervallum temporis accufator non erit audiendus, nifi docere possis, se fuisse justis rationibus impeditum "."

Nor shall any person be indicted, except upon the testimony of two lawful witnesses. either both to the same overt act, or the one of them to one, and the other to another overt act of the same treason.

And now, fince the decease of the late pretender, a copy of the indictment, with a life of the witnesses to be produced at the trial. and of the jurors impanelled, with the professions, and places of abode of the said witnesses, and jurors, shall be delivered to the person indicted, ten days before the trial and it feems, that this would be confirmed exclusively of the day of delivery, and the day of arraignment. for beautiful of all of a line of approve

Independed)

x 3 laft. c. 2. Bracton, 1. iii. fol. 178. 6.

Y 7 W. III. c. 3. 6 2. which clause is founded on a Edw. VI. and 5 Edw. VI. And 1, 2, Phil. & M. 2 7 Ann. c. 22. and 20 Gen. II. c. 30.

Further, the same process is given to compel persons to appear for the person accused, as is used to compel them to appear against him; and lastly, they shall be upon oath, which was not the usage heretofore.

I should have observed, that these privileges, except the last, are not extended to certain offences concerning the papal supremacy; nor to those against the coin; nor indeed to any treason, wherein the corruption of blood is saved by statute.

The jurors must, by the common law, be of the same county wherein the offence was committed. When the trial comes on, the prisoner is allowed to object peremptorily to thirty-five, on mere caprice, prejudice, or private knowledge of their characters or prepoffessions; and to any indefinite number, upon the assignment of a legal objection to each,

In this, and in the whole course of the profecution, he shall also be allowed to make his defence, as well in points of fact, as in legal questions, by Counsel learned in the law, not exceeding two in number, to be named by himself, and assigned by the court; and his Counsel

Counsel shall have free access to him at all seafonable hours .

The trials of Sir William Freind, Sir William Parkyns, and others, on the affaffination plot, came on after this provision had received the royal affent, but before the commencement of its operation b. " I intreat," faid the last of these gentlemen, " that I may have " the allowance of Counfel; I have no skill " in indictments; I do not understand these " matters, nor what advantages may be prose per for me to take. The new statute wants " but one day. What is just and reasonable " to-morrow, furely is just and reasonable fo to-day; and your Lordship may indulge " me in this cafe."

Holt, Chief Justice, was too good a judge to fuffer the stubborn principles of law to yield to the milder inferences of equity. " We cannot (he replied) alter the law, till lawong coom enemt, di

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^{2 7} W. III. c. 3. § 1. But this did not extend to any prosecution by impeachment till stat. 20 Geo. II. e. 30. which allowed Counsel in that case also. "And with great reason (saith Mr. J. Foster) since the Defendant is struggling under the whole weight of the Commons of Great-Britain " b State Trials.

"makers direct us; we must conform to the law,
"as it is at present, not what it will be to-more
"row; we are upon our oaths so to do,"

It is remarkable, that this indulgence is not yet allowed, except in points of mere legal disquisition, in any other capital crime; a deficiency, which hath given rife to the very benevolent adage, " That the judge shall al-" ways be counsel for the prisoner." And indeed, the probity of the English judges, asfifted by their experience and humanity, would generally afford ample fecurity to persons accused, if counsel had not full permission to be employed against them. This permission, in good times, was never exerted without great discretion and tenderness; still however it was not always ineffective in its confequences. But furely it is contradictory to the first principles of justice, that a prisoner, labouring under the weight of a capital charge, weakened by long confinement, diffracted by apprehensions though perhaps innocent, diftreffed by the tears of his family, checked by conscious ignorance, and disconcerted by the awful novelty of his fituation; that, in fuch a state of mind, a prisoner should be singly exposed to the united, and unrestrained prosecution

tion of learned men, habitnated to public speaking, and (in the words of a very ancient author) " fkilled in the art of forwarding and defending a cause by the rules of Jays and customs of the realm som The judge may be anxious to expole, and refute the provarication of the witnesses, but he is igno rant of the minute circumstances of the fact in question the knows por the characters of the men, and cannot from the trial to receive private infirmations from the priferer. The jurors are honest, and inclinable to marcy. his equals, and his neighbours; chosen in fome measure by himfelf , and superior to all furpicions but perhaps they are illiterated at all events they are man a and therefore liable to be hurried away by the eloquence and abifuccessive emotions of anger, enterovbe lo spiil

pity. There is a very remarkable anecdore Both the Romans d, and Athenians, appear to have given full scope to the exertion of cretare, from whom Apelles drew his pichare

c Gents ne sachent my comunement touts les excep-tions que valent en sesponse; sont countors necessaires que sachent les causes avancer et desendre; per les Rules del Ley, & les niages del Realme.

Myrror, c. 3. de Exceptions.

d' Non solam auten diceade sed stiam sactende anen-dam, lacrymas movemus: unde al produccie ipsus qui seri-clitentur, squalidos atque desormes, et liberos essent es pa-renies,

oratory in criminal cases; both for and against the defendant. Almong the Athenians in deed there was a law of Solon's, forbidding advocates to use either exordia or pergrations; or to circumvent the pations of the judges by artifices, either of commileration or amplification. Yet we are told by Cicero, that, when Demosthenes was expected to plead; the fame of his eloquence brought a general concourse of strangers 180 Athens from the most remote parts of Greece, as to the most celebrated spectacle in the world; and those of his orations, which have reached our time. are undoubtedly powerful examples of that pathetic and personifying species of eloquence. which is calculated to intoxicate the imaginal tion of an audience, and communicate the fuccessive emotions of anger, indignation, and pity. There is a very remarkable anecdote recorded by Athenaus s, relative to the trial of Phrynd, the Athenian Courtezan. She was the fame, from whom Apelles drew his picture

rentes, institutum; & ab accusatoribus ossendi cruentum gladium, et letta'e vulneribus ossa; et vestes sanguine persusais
videmus, et vulnera resolvi, ac verberata corpora nuduri,
quarum rerum ingens pleramque vis est, velut in rem
presentem animos hominum ducentium. Et populum
Romanum egit in surorem presenta Cair Casaris prolata in
soro cruenta." Quinctil, vi. v.

Athonaus, I, xiii. Atheneus, I. xiii.

of Venus rifing from the waves, and who ferva ed alfo as a model for the famous flame of Praxiteles; two circumftances, not immuterial in support of the following fact. " Physical " not cum in capitall nord patrecinaretur Hy-" perides, et jans manifestum effet calculis judi-" cum condemnatum iri; in aperium eam pre-" duxit, et difciffis tuniculis, pestoreque nudato, " postremă orationis parte, illius conspectă pulchritudine, ita perbravit, ut, tanquam mi-" niftram facer dotemque Veneris, Judices religi-" one tacti, et mifericordid commoti, necandam " minime censuerung." To this sudden fenfibility of the Areopagites, one may fairly apply Quintilian's observation, et quod barum rerum "Ingens plerumque vis est, velut in rem prafensem animos bominum ducentium. of nothing to higgest, hipport, or refute questions.

It is a consequence of that wisdom which characterizes the English, as a people, in the whole system and administration of their Laws, that all the artifices of speech are banished from the Bar. The passions ought not to be addressed in appeals to the reason. The unsubstantial harmony of declamation may be well adapted to the ears of an arbitrary tribunal: but the decisions of English Judges are founded on the argumentative inferences of strict

first flatutes, and recorded precedents. Our courts have furnished proofs indeed, that the ftrains of ancient eloquence are weither immitable, nor unattainable is but a nobler and more proper theatre hath been found for the exertion of that talent. Plain fenfe, delivered in accurate exprellion, with a warm and graceful articulation, is the true eloquence of law.

The tolleral william the the traffer the But to return to my inquiry, how far Counsel ought to be admitted, either for, or against the defendant, in criminal profecutions. Upon the whole, perhaps it might be the best medium, in all cases, to confine the discussion of the fact to the artless unguided tale of the witnesses, with a full permission to Counsel, on both sides indifferently, to fuggest, support, or refute questions, or objections of law, and to undertake the management at large, when the iffue turns not upon the general question of "Guilty" or " Not Guilty," but upon collateral facts f. It

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f In which case, from instances to early as the fift year of Hen. VII. the defendant appears to have been always entitled to the full affiftance of Counfel, and indeed without flich affiftance it would be impossible for him to know either when to hazard his defence upon collateral allegations, or how properly to enforce those allegations. See Fofter, p. 232. Stra. 224. founded on the arguments ive inferences of

might be proper at the same time to declare. how far trivial miftakes, in matters of mere form, mould continue fatal to the whole procefs; and whether any exceptions of counfel should be heard or allowed s, but what tend in some degree to affect the merits of the ruled by Holt, Chief Judices Low the plan " no provide act a litere be open withers to an

\$ 2. The admissibility and sufficiency of evidence in trials for high-treason is also sub-Jecled to very peculiar limitations. non be an overt act of treating and

No evidence can be received of any overt act, not charged in the indictment; except, as in support only of one which is charged. Two witnesses are requisite to the conviction, in the lame manner as to the indictment and they shall in giving their evidence be confronted with the person accused, which is now indeed the practice in all cales. If two diffinct treasons be charged, one witness to each shall not be two within the meaning of the statute; but one witness is sufficient to prove any fact, on which the criminality of the charge is ultimately and not immediately founded; I shall cite an instance h.

Forder to S. cafe of the ce. State Talah B Hale's Hift P. C. ii 193. Mr. Emlyn's note.

When, in the trial of Captain Vaughan for adhering to the King's enemies, it was necessary in the outlet to prove him a subject of England; it was objected by his counsel, that one witness only had been called for that purpole; and the objection was overruled by Holt, Chief Justice, " for that is " no overt act; if there be one witness to " prove that, it is sufficient." In like manner, writing, being a deliberate act, certainly may i under some circumstances with publication be an overt act of treason; and when so laid in the indicament, must be proved by the testimony of two witnesses. But the testimony of one is competent to prove writings, offered only as collateral evidence; and fuch papers, though not of the hand-writing of the priloner, may be read as evidence, if found in his custody k; and papers under certain descriptions may be in the legal custody of a person, though not actually found upon him ! each thall not be two webin the

were the words of the Civil Law, which did not allow the testimony of one witness

When.

Foster 198. case of Layer, State Trials, vol. vi. p 321.

k State Trials, wol. vi. p. 28s. O Trials, wol. iv. p. 431.

to be conclutive in any case " ... And Baron Montefquien feems to have adopted this idea in its follest detiende. " Les Lois (dit il) qui fens pésin un bomme fur la déposition d'un Soul sémoin, fam fatales à la liberse. La raifon en exige deux ; parce qu'un témois qui affirme, et un accuft qui nie font un partage ; et il faut un tiers pour de vuidene Les Grees, et les Ron mains enigaciens une wain de plus pour condamner. Nos loin françoifes en demandent deun. Les Grees prétendoient, que leur ufage devoit été établi par les Dienx sminis blot le notre 37 noi Divido

of any offence whatever. I ofight perhaps delmay bendoubled, swhether the pleas of the prifophrous bich is dictated by the fentiment of felf-preservation's, can with any propristy be said to counterbalance the dolerns outh of his diffurenched accuser Ter fuch ware the featiments of the profident Montel

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The presumed to presignature and m Cod. iv. 20. 9. " Vox nnius vox nullius est." Har-

m Cod. 1v. 20. 0. Vox brills vox nutrius ett. Harmonius, l. i. c. 6. See the Commentaries on the Laws of England, B. iv. 35 tt.

n L'Esprit des Loix, l. xii c. 3.

It is not unusual, even at this day, upon the Continent, to administer an ordan the supposed driminal, in order to extort the truth from him; reducing him says the Marquis Beccaria) to this terrible alternative, either of offending God, or of contributing technisown immediate destruction; and leaving him only the choice of becoming a bad Christian or a Martyr.

writers on this subject, have been too much back of Tonge M. 2. 1 . 1. C. 1. 204 quieu, s. .

quieu, and fuch hath been the usage of many great and learned nations. The law of England hath feen reason to reject an idea, which, if firstly adhered to, would give the privilege of impunity to every crime, however flagrant in its nature, if committed in the presence of one person only. Except therefore in cases of treason, in which the principles of our constitution demand peculiar strictness of proof, one wirness, if credited, is with us fufficient to establish the conviction of any capital crime, and indeed of any offence whatever. I ought perhaps to except also the case of pegury, in which, a fingle unsupported witness, would be adjudged infufficient; for the oath of the accufer being placed in opposition to the wath of the accused, truth remains suspended. In fuch a fituation, the scale of innocence should be presumed to preponderate. m God for ages of Alex and agreed as line in the and

The nature of my delign will not permit me to extend this digression upon criminal process in cases of treason, to an enquiry into the general principles of evidence. It is however a field still open to investigation. For the considerations of some very ingenious writers on this subject, have been too much influenced

influenced by their acquiescence in practical authority; and we are furnished, rather with useful and sensible histories of what the law of evidence actually is, than with any free and speculative disquisition of what it ought to be.

§ 3. By statute 7 W. III. c. 3. the abovementioned requisites towards conviction can only be supplied by " the confession of the party, made in open court, willingly and without violence."

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The words "in open court" were not inferted in the statute of Edward VI, which contained the rest of this proviso; and confessions, taken out of court upon the examination of the party, had been holden sufficient P. But now, it should seem, that such confessions, though proved by two witnesses, cannot in any case operate to conviction; and that there must still be two witnesses to the treasonable sact.

But another doubt hath arisen, how far such confessions can be admissible, even as

P Case of Tonge. Hale's Hift. P. C. i. 304. Kel. 18. Anderson, ii. 67.

collateral evidence; and it feems to be the better opinion 4, " that a confession out of " court may be proper to be submitted to the in corroboration of the other evil dence of the overt octs," only " when " made during the folemnity of an examina-"tion before a Magistrate, or person having " authority to take it when the party may " be prefumed to be properly on his guard, " and apprized of his danger." However, a greater and more exceptionable latitude of construction, on this subject, appears in some instances to have been admitted.

Control of the Change of Barrent VI. which

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The words "they begin " about sall at

coomined the rest of this pravious and con-

from Bacon's Abridgment, vol. v. p. 146.
The two learned Judges, who differred, had no doubts on a future occasion, as to the admissibility of confessions on matters merely collateral; and in this diffinction they feem to have proceeded on very folid grounds. For, in the case of Smith, who was indicted in June, 1709, for additring to the Queen's enemies," Alienage was the defence;

: M

⁻q Foster; p. 242, 243. r At a meetting of the Judges in January, 1707, to confider some matters relative to the intended trial of Gregg for treason, Holt, Ch Justide, Powell, Powis, and Dormer Justices, Smith, and Bury Barons, were all clearly of opinion, "that the prisoner's confession, though not in court, might, if proved by two witnesses to have been voluntarily made, notwithstanding what is contained "in the 7 W. III. c. 3. § 2. be read as evidence against him. But Trevor, Chief Justice, was of a contrary opinion, and Tracy, Justice, doubted." I should obferve, that this case is not in any reporter, but copied

The confession of a criminal, when taken even before a magistrate, can rarely be turned against him, without obviating the end for which he must be supposed to have made it. Besides, we have known instances of murders avowed, which never were committed; of things confessed to have been stolen, which never had quitted the possession of the owner.

It is both ungenerous therefore, and unjust, to suffer the distractions of fear, or the misdirected hopes of mercy to preclude that negative evidence of disproof, which may possibly, on recollection, be in the power of the party; we should never admit, when it may be avoided, even the possibility of driving the innocent to destruction. Nothing was more common in the beginning of the last century than confessions of witchcraft. Sir James Melville

and his confession that he was an Englishman born, was allowed to be admissible Evidence, by Trevor, Powel, Powis, Tracy, and Bury, though his counsel insisted on the not of the 7th of King William." Foster's Rep. 243. It is said, however, that evidence of confession was, without any such distinction, holden sufficient by the

It is said, however, that evidence of confession was, without any such distinction, holden sufficient by the Judges, who sat upon the commission in the North in 1746. But the instances are not, I believe, in print; and "it is dangerous (saith Sir Edward Coke) to report a case by the ear, especially concerning treason.

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mentions several instances in the prosecution of Earl Bothwell; and, though rather a sceptical man, was candid enough to believe, them. The poor women were accordingly burnt; and posterity was furnished with a very accurate description of the devil; who is said to have appeared "in a black gown, with a black hat on his head, in the attitude of preaching, and with posteriors as cold as "ice s"

The evidence of words, alledged to have been spoken by the person accused, and connected with the criminality of the charge, ought also to be received with great distrust. Such words are either spoken in the zeal of unsuspicious considence, and cannot be repeated without a breach of private faith, which detracts much from the credibility of the witness; or in the unguarded hours of boasting dissipation, in which case they are not unlikely to be false in themselves, and very likely to be falsely repeated. Besides, words may be very innocent when spoken, and highly criminal when related; for their determinate signification depends much on the

Melville's Memoirs, fol. p. 194.

tone in which they are uttered, " It often happens too, that, in repeating the fame words, a different meaning is conveyed, " which depends on their connection with " other things; and fometimes more is fignis fied by filence, than by any expression whatdifficulties in the ente, require the diff. rays.

the course but established the new cold § 4. Such are the principal rules, limitations, and reffrictions, to which the English profecutions of high treason are subjected in every stage of the process, in the will said

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Lastly, the positive testimony of a thoufand witnesses to the positive allegation of the indictment is not conclusive in any case, as to the verdict of the jurors. But they will still retain an indisputable, unquestionable right to acquit the person accused , if,

t L'Esprit des Loix, lexil. c, 12.

[&]quot; In the Case of 7 R. II. Tit. Coronæ Fitz H. 108.
" upon Acquittal of a common thief, the Judge said, the
Jurors ought to be bound to their good behaviour
during their lives; but, saith the book, quære per

[&]quot; quel Ley? But that was only gratis dictum by the " Judge, for no such thing was done." Vaughan's Reports.

It must be confessed, that in later times the Judges, in their disagreements with Jurors, did not confine themselves to threats; and it would be uncanded to suppress the following instance, because it is connected with the matter in question.

in their private opinions, they difficiences, they accusers; or if, in their consciences, they think, however erroneously, that the fact partakes not of that degree, or species of criminality, with which it is charged in the indictment. They may, if they find doubts or difficulties in the case, require the direction of the court; but whether they be in any case compellable, either to have recourse to that direction, or to submit to it when voluntarily given, are questions, on which a very important diversity of opinion bath appeared in the minds of great and good men.

"It is the privilege of Englishmen, fay

Kelyng's Rep. 50. "Memorandum, Lent Circuit, Winchester, 18 C. II. one Henry Hood was indicted for the murder of J. Newen, and upon the evidence it appeared, that he killed him without any provocation. And thereupon I directed the Jury that it was murder; for the law in that case intended malice; and I told them they were judges of the matter of fact, viz. whether Newen died by the hand of Hood: But whether it was murder, or manslaughter, that was matter of law, in which they were to observe the direction of the Cours. But notwithstanding they would find it only manslaughter. Whereupon I took the verdict, and fined the jury 51. a-piece, and committed them to jail, till they found furcties to appear at the next affices, and in the mean time to be of good behaviour. But after, upon their petition, I lowered their fines to 40s. a-piece, which they all paid, and entered into recognizances.

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by their equals, and that privilege will become vox et pratered nibil, whenever it ceases to be the duty of those equals, to infer and conclude their verdict from the testimony of witnesses, by the act and force of their own understanding.

Would it not, they continue, be a most preposterous doctrine, that they, who, under the obligation of a solemn oath, are chosen to try a sellow citizen for a crime, and as a criminal, and bounden by that oath to give a true verdict between the public and the prisoner according to the evidence; that, in this predicament, they should be told, that the criminality or innocence of the intention, the legality or illegality of the fact, are matters of indifference, not subjected to their enquiry; and that their verdict ought not to be influenced by any such considerations?

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[&]quot;To what end (faid Lord Chief Juffice "Vaughan), are the Jurors challenged fo "forumulously to the array and noils? to

[&]quot; fcrupuloufly to the array and poll? to

[&]quot;what end must they have such a certain freehold, and be probi et legales bomines,

[&]quot; and not of affinity with the parties con-

[&]quot; cerned? to what end must they have in

[&]quot; many

" many cases the view, for their exacter information chiefly ? to what end must they " undergo the heavy punishment of the vil-' lainous judgment ? if, after all this, they " implicitly must give a verdict by the dic-" tates and authority of another man, when " fworn to do it, according to the best of " their own knowledge? A man cannot fee by " another's eye, nor hear by another's ear; no " more can a man conclude, or infer the thing " to be resolved by another's understanding or " reasoning; and though the verdict be right, which the jury give, yet they, being not affured it is so from their own understand-" ing, are forsworn, at least in foro conscien-" tig. That decantatum in our books, ad " questionem faeti non respondent judices, ad " questionem legis non respondent juratores, li-" terally taken, is true; for if it be demanded, what is the fact? the Judge cannot an-" fwer it; if it be asked, what is the law in " the case? the Jury cannot answer it. But " upon all general issues, though it be a matster of law, whether the defendant be a tref-" paffor, a debtor, diffeisor, or disturber, in " the particular cases in iffue; yet the jury " find not, as in a special verdict, the fact of every case by itself, leaving the law to the VHSM ** court:

" court; but find for the plaintiff or defen-" dant upon the iffue to be tried, wherein " they resolve both law and fact complicate-" ly, and not the fact by itself: so as though " they answer not fingly to the question, what " is the law; yes they determine the law in all "matters, where iffue is joined and tried in the "principal cafe, except when the verdict is " the facts alled ged by way of justiste laispelve."

"Special verdicts," fay the Commentaries on the Laws of England, attarife, when the "jures doubt the matter of law, and there-"fore chuse to deave it to the determination" "hof the court" a gain, of the court to

eufe, or alleviation be true; is the proper

"the law inakein ale of the teret. "And it is (faith Sie Matthew Hale) the conscience of the jury, that must pronounce "the prisoner guilty, or not guilty for to " fay the truth, it were the most unhappy " case, that could be, to the judge af be, fat' " his peril, must take upon him the guilt or " innocence of the prisoner; unhappy also " for the prisoner: for, if the judge's opinion " must rule the verdict, the trial by jury ference; and, is a subsequent reliable be bluow ?? casion to cite another passage from the lame work, but

v Vaughan's Reports, p. 1481 vista parado visu s lo

^{*} Commentaries, B. iv. p. 354.

But, a contrary opinion hath been gimen by a learned and worthy Judge in very decifive language. "In every cafe (faith Mr. Julice " Foster, p. 255) where the point mirneth " upon the question, whather the homicide " was committed, wilfully and maliciously, for "under six umflances justifying, excusing, or " alleviating the matter of fact, wiz whether " the facts alledged by way of justification; ex-" cuse, or alleviation be true; is the proper " and only province of the jury But whother. Supon a Supposition of the fruth of the facts; "fuch homicide be justified, excelled, or alle!" "winted, must be submitted to the judgment" " of the court." Again, p. 256, while he "the law maketh use of the term, malice " aforeibbugbt, as deferiptive of the crime of "murdor, it meanoth, that the fact hath been "attended with fuch eindim lances as are the ordinary lymptoms of a wicked, depraved, " malignane spirit." And p. 257 4, at the "malus animus, which is to be collected from intinocence of the prifore; a unhappy alfo

learned writer hath refled his position on the mere authority of an effection, unsupported by argument or reference; and, in a subsequent chapter. I shall liave occasion to cite another passage from the same work, but of a very contradictory import, and an angus V

"Commentaries, gaive possible of an area out the line out galves 313 teach of the version out galves 313 teach of the version out galves 313 teach out the version out the version out galves 313 teach out the version out the

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"all circumstances, and of which, as I before faid, the court, and not the jury", it to judge, is what bringeth the offence within the domination of willful malicious murder, whatever might be the immediate motive to it, whether it he done as the old writers express themselves, ird, well odio, well caused be iris, or from any other wicked, or mischies wous incentive hu and appliance to notically

When wife and good men differ upon points of great constitutional importance; it is the duty of their humbler sellow citizens, to

In the trial of Coke and Woodburne for disfiguring Mr. Crifpe, it was much urged by the former, that
his intent to kill, and not to main, was a point of lay,
proper only for the decision of the court. But the Lord
chief justice King, after stating the Evidence, thus addressed the jury.

"Now, gentlemen, what the intent of these persons was, in slitting Mr. Crispe's nose, you are to try; the is a matter of sall for your consideration and determination: it is the same in other selonies, where the intent of the party makes the crime. Harglary is breaking open an house in the night time, with an intent to commit a selony; though the saloup be committed, yet as there were an intent to do it. It is burglary. So in the case of larceny, the intent, with which another man's goods have been taken away, is a matter of sale to be enquired into and determined by the jury. So that in this case you were try no other matter than what is taked in the filming viz. the intent of the parties." State Trials, vol. vi. p. 222.

Talma, Anni Mer, Lincold A.

wait the result of that dispassionate and candid disference, with a silent prayer, " ne quid
" detrimenti tapiat respublica." To which
however this may be added as a certain truth,
that the political liberty of every individual
bears a proportion to the security given by the
laws to the innocency of his conduct; which
security decreases, in proportion to the multiplication of penalties, the uncertainty of penal
laws, and the irregularity of trials.

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A further Digression relative to the gradual Improvements of criminal Process.

5 1. In the fixth century, Clotarius, King of France, made a law, that no-body should be condemned to death without a hearing. Prohibitory laws may generally be presumed to have a retrospect to a contrary usage; it seems strange therefore, that this, which I have mentioned, should have been

L'Esprit des Loix, l. xii. c. 12.

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necessary

hecessary in support of the most obvious principle of justice. But the efforts of human wisdom are slow in their progress, and limited in their extent; political systems therefore are, in all instances, though in different degrees, imperfect, and consequently best understood by comparison.

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In this point of view, a short state of criminal process by the common law of England will form a striking illustration of the foregoing chapter, and may have a more essential effect; for it will be found, that in profecutions of felony, and in other particulars, we still retain some vestiges of that oppressive barbarism which I am about to describe.

I speak not of those proceedings, which were founded in the gross superstitions of our fore-fathers; such as the presumptuous purgation of ordeal, either by fire or by water;

a violatit un cagada historia led suffi

We find in the Welft laws a third species of ordeal, unknown probably in all other countries. Famina matura viro, que cum aliquo claudostino abiverit, et vel in agris, vel in domo staprum passa sit, et ab illo postea repudiata suerit, et querelam contra illum instituerit, apud gentiles suos et in curid, boc modo dotabitur. Si tauri trimi caudam detonsam, et sebe inuncam, per januam vimineam immissam, mulier intra domum, pedibus timini inninis, manibus

in which it was impossible for innocence to escape, without a miracle from Heaven d: nor yet of that more unchristian, impious mode of trial by battle; which, when the defendant was innocent, often ended in his murder; and when guilty, in his triumphal acquittal, with the additional stain of the appellant's blood upon his head. My observations shall be confined to the boasted, and venerable institution of trial by jury, its preparatory process, conduct, and consequences.

wing chapter, and may have a right effect

\$ 2. The ancient Justiciarii in itinere made their circuit round the kingdom, for the purpose of trying causes and criminals, only once in seven years; in which interval, by the common calculation of lives, it is probable, that exclusive of the distresses, and consequent depopulation of families, one half of the wretches under suspicion, and in custody, died in the dangeon. At all events, the grime had generally escaped the memory of mankind, before the execution of the crimi-

wibus prebendens detinuere potueris, lices taurus a duobus bominibus uterinque stimulis urgeatur; pro sue babebit in compensationem, ob insumiam violate pudicitie: sin aliter, bubebit tautum sebi, quantum manibus adbaseris. Leges Wallick, fol. p. 82.

Wallies, fol. p. 82.

Murat. Differtatio de judiciis Del. Antiquit. Italic.

vol. iii. p. 612.

But this was remedied fo early as A. D. 1285, by flat. 13 Ed. I. c. 30. whence the present Justices of assise and Niss prius are derived; an inftitution, which bears some refemblance to one of the customs ascribed by Tacitus to the ancient Germans; eliguntur in iisdem conciliis et principes, qui jura per pagos vicosque reddunt. Centeni singulis ex plebe comites, confilium fimul et aufforitat, adfunt .

\$ 3. The temporary release of the prisoner. previous to the trial, when the criminal charge was apparently unjust, or ill founded; or when the crime was of fo inferior a nature. as to admit his enlargement on pledges for his future appearance, feems, in the earliest periods of our conflitution, to have been a matter of right; but the courtly pliability of some judges had involved this doctrine in very oppressive difficulties. These were at length happily, and totally removed , in 31. " Secretary of the above manished Herman & II.

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to a continue

f Stat. 31. C. II. c. 2. "This act was carried by " an odd artifice in the House of Lords; Lord Grey

and Lord Norris were named to be the Tellers: Lord Norris, being a man subject to vapours, was not at all times attentive to what was passing; so a very fat

[&]quot; Lord coming in, Lord Grey counted him for ten,

C. II. whose reign, though in its confequences happy to this kingdom, was a strange medley of liberty and tyranny, honour and profligacy, religion and impiety, benevolence and bloodshed. is D'ensione and

In every stage both of civil and criminal fuits, the laws, like the prayers, were administered in an unknown language; and this continued, as to matters of record, indictments, pleas, verdicts, judgments, &c. until the stat. 12 Geo. II. c. 26. They were also written in a strange hand with technical abbreviations. In this there was real danger; for though the indictment was always read to the prisoner in English; yet if there were any objections, recourse was had to the Latin original to support its insufficiencies; contra formam statut. in bujusm. caf. edit. et provis. (fays Lord Hale) shall be construed either fingularly or plurally. We cannot wonder then at the recital of the above-mentioned statute b. that " many and great mischiefs do frequently

h Commentaries, B. iv. 412.

h 12 G. II. c. 26.

as a jest at first, but feeing that Lord Norris had not observed it, he went on with this misreckoning of ten, and by these means the bill passed, though the manet, vol. ii. 8vo. p. 121.

"accrue to the subjects of the kingdom, from the proceedings in courts of justice being in an unknown language; those who are impleaded having no knowledge or understanding of what is alledged for or against them, in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practifing the law." But we may reasonably wonder, that the remedy was deferred to the eighteenth century.

§ 4. The christian name, and surname of the defendant, with his addition of state and degree, were first required to be set forth in the indictment, by an act of Henry the Fisth. One may infer, that, previous to this act, there was great want of precision, in the formal parts of process; but the inclination of succeeding Judges, in favour of life, hath carried this matter to the opposite extreme of scrupulous, and over-grown nicety. Numberless are the instances, in which the substance of justice hath been lost in the pursuit of the shadow of mercy k.

The

i H. V. c. s.

k For instance murdredavit for murdravit, feloniter for felonice, have been adjudged to vitiate the indictment;

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burgariter

The discontinuance of Latin indictments hath rendered such instances less common; but there is still sufficient reason to apply the observation of Sir Matthew Hale: " for the " truth is, that it is grown to be a blemish, " and inconvenience in the law, and the ad-" ministration thereof; more offenders escaping by the over-easy ear given to exceptions in indictments, than by their own inno-" cence; and many times gross murders, burglaries, robberies, and other heinous and crying offences, go unpunished by these un" seemly niceties, to the reproach of the

burgariter for burglariter hath been a fatal objection, but burgulariter hath been holden good. Yet these exceptions were allowed on the idea of uncertainty, not from an inclination to classical accuracy; for prefate regime

did not vitiate.

31 Eliz. J. Webster was indicted for murder, and the stroke being laid sinistro bracio instead of brachio, he was dismissed. In Leke's case, 34 Eliz. "A. B. alius dictus A. C. butcher" was deemed insufficient; it ought to have been "A. B. butcher, alias dictus A. C. butcher." An indictment of poisoning, wherein it is alledged, that J. S. sidem adbibens to the prisoner, et nesciens potum pradictum cum veneno fore intaxicatum accepit et bibit, without saying venenum pradictum, is not good, and shall not be supplied by the implication of the other parts of the indictment. So gladium in dextrâ suâ, without "manu," &c. 5. Co. Rep. 122. Dyer 46. Co. Rep. 39.

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.44 law, to the shame of government, to the

" encouragement of villainy, and to the dif-

" honour of God !"

- 5. At the common law m, no prisoner, in capital cases, was entitled to a copy of the indictment, panel, or any other of the proceedings. It was refused to Sir Harry Vane, and Colonel Sidney. It was again much urged in the trial of Lord Preston, A. D. 1600, who defired to have it argued by counsel; which the court unanimously refuled, " it being a point, that would not bear a debate.*
- § 6. It appears to have been a common practice fo late a as the reign of Charles II. for the Judges in their circuits to impose arbitrary fines on Grand Juries for Supposed concealments and non-prefentments; a dangerous exertion of power, stending to the encouragement of ill-founded accufations, and not warrantable by law. And a little little Me to refro a the frolen assist

animagnical and constitution of the base of the califul

§ 7. There were several means at common law of bringing felons to trial, without

Hale's Hift. P. C. ii. 124.

m Foster, p. 228. State Trials, vol. iv. p. 411.

vaughan's Rep. p. 153. Hale's H. P. C. ii. 160.

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any previous indictment; such as, upon the Mainouvre, when the thief was detected with the thing stolen in manu, and upon appeals.

The latter mode of appeals, is still subsisting; and though confidered as odious by fome, doth not appear in any instance to have occasioned injustice. Perhaps it ought to be regarded as an old branch of the law, which by possibility may become an essential safeguard to the rights of the people. It must however be admitted to have arisen from that ancient barbarous principle of legislation, which exacted the punishment of the criminal merely as civil damages to the party injured o; and accordingly I find, that in the ancient Salic laws murder was punished with death, and no composition admitted, unless with the confent of the nearest friend of the deceased. From a similar reasoning, it continues at this day the law of Saxony, that, if a thief fuffer death, his heir is not compellable to restore the stolen goods P.

o Kaim's Hift. Law Tracts, p. 40. See also Robertson's Hift. of Charles the Fifth, vol. i. P Carpzovius, iv. 32, 23.

The conviction or acquittal upon an indictment of murder or manslaughter, was at common law a good plea in bar to the appeal; but this privilege tended only to prolong the imprisonment and procrastinate the delivery of persons accused; for, before the statute 3 Hen. VII. the court was obliged by law not to proceed upon any indictment of murder within the year and a day; and it was usual in other cases to allow a similar interval, because of the interest of the appellant; who being thought entitled ex debito justitie to the gratification of his revenge, might in an appeal of death have execution upon the judgment notwithstanding any pardon; and who, in case of robbery ought to have restitution, which upon an indictment before statute 21 H. VIII, he could not have 9.

Appeals in parliament by private persons, which, especially in matters of treason, were in frequent use , were abolished by statute H. IV.

Q See the case of Armstrong v. Lisle, reported by Lord Chief Justice Holt, (Kelyng, p. 96.) which contains much information on this subject.

1 3 Inst. 31, 132. 1 Mod. 148. "All petitions against great persons, and the prince's officers, were heard before the barones majores. And this court became a place of original jurisdiction for impeachments, which were preferred

1 H. IV. c. 14. "for the many great incon"veniences and mischiefs, which had of"ten happened thereby." A custom of this kind is observed by Tacitus, to have prevailed among the Germans; "licer apud concilium accusare quemque, et discrimen capitis intendere."

while make the party to be the result of

§ 8. I now proceed to the arraignment of the Priforer; in which state of the process, as he must be presumed to be free from guilt, he ought not to be required to hold up his hand at the bar! It is a fort of insult offered to innocence; nor is the geremony of kneeling at the bar, as if justice were the consequence of intreaty, less liable to objection. In [the former practice though dispensable (for any criminal may refuse to hold up his hand) we still pursue the steps of our ances-

preferred either by private persons or by the whole commons of England; and likewise the dernier resort to correct the errors of inserior judicatures; and when any matter of sact was to be tried, it was usual to sale writs to the Justices in Eyre, to summon the parties before them, and to try the sact according to the command of the writ, as may be seen in Ryley 74, 75. Gilbert's Forum Romanum, p. 8.

5 De Mor. Germ. c. 12.

Delta Period

Lord Bacon mentions a Welfhman, who, when fummoned to comply with this ceremony, conceived the judge to be a fortune-teller.

tors; the latter doth not appear to have been anciently used .

are the Line and health and the

It is the law of the land, and certainly ever hath been fo, that a prisoner ought not at any time to be charged with fetters "; unless the Jailer be constrained to have recourse to them by the actual necessity of fafe custody. In the trial of the regicides it was determined by all the judges x, " that when prisoners " come to the bar to be tried, their irons " ought to be taken off, be their crimes ever " fo great." And this agreed with Flets ". " Cum autem capti in judicio produci debeant, 46 non producantur armati, sed ut judicium rece cepturi; nec ligati, ne videantur respondere " coacti." -- Yet Pratt, Chief Justice, in the trial of Layer 2, ventured to make a diffinetion

v State Trials, vol. i. p. 83. D. of Norfolk's Trial, A. D. 1571. And p. 157. Earl of Arundel's Trial.

w Grand abusion est, que prisonner soit charge de ferres, ou mise en peine, avant ceo que soit attaint de

felony. Mirror, c. 5. 5 i. 54.

x Kelyng's Reports.

y L. i. c. 1.

z " My Lord (faid Layer) I have been used more like " an Algerine captive, than a freeborn Englishman; I " have been dragged through the fireets by the hands of jailors, and have been made a flew and ipectacle. "I now hope to have these chains taken off, that I may
"have the free use of that reason and understanding which
"God hath given me; they have brought the strangury tion between the time of arraignment and the time of trial, and would not allow the chains to be taken off. His Lordship did not consider, that the distraction of the mind, in so painful and important a criss, ought not to be aggravated by the tortures of the body. The rights of the unbappy have been rarely violated in modern times.

It is thought by a very learned writer, that the dreadful punishment, inflicted on a refusal to plead, (even when the offender, if convicted, would be intitled to the Benefit of Clergy), was unknown to the common law, and derived from a statute of Edward I. Be this as it may, it still exists in full force; though repugnant to the spirit of our constitution, and nearly allied to torture, which was always illegal, though sometimes practised b. The Commentaries on the Laws of England

[&]quot;upon me to a very painful degree; and I am told your "Lordship is afflicted with that distemper." This was argumentum ad bominem; but it was ineffectual.

Defervations on the ancient flatutes, p. 62.
Foster, 244. Rushw. i. 638. "The Judge (saith Sir Ed. Coke, 3 Inst. p. 25.) is never present at any torture; neither, upon the arraignment of the prisoner is any torture ever offered." These words seem to admit the use, but the subsequent passage in the same volume.

England have, in very pathetic terms e, called for the legislative abolition of this cruel procels; and furely it would be easy in felonies, as in the case of treason, to consider an obstinate refusal to plead, as a confession, and conviction of the charge; or even as a plea of Not Guilty, which is the practice of the Scotch courts, and probably derived from the civil law d

But alteratives, though preferable to abfolute neglect, are an infufficient species of medicine, when the cause of the disease is fuffered to remain. If the forfeitures , annexed to the conviction of the crime, were in all cases equally extended to the contumacy

te is vertical matrix but the throughout

lume, p. 35, denies the legality. "There is no law to warrant tortures in this land, nor can they be justi-fied by any prescription being so lately brought in."

c B iv. p. 323.

d Nibil interest neget quis an taceat interrogatus; an obfeure respondeat ut incertum dimittat interrogatorem. Dig.

ii. 1. 11. 7.
It was not unufual in England, fo late as in the reign of Charles the Second, to force criminals to plead, by tying their thumbs together with compressed whipcord. See Kelyng, p. 28. And there were even in the reign of Q. Anne, occasional inflances of this practice; which was certainly a species of torture in the work fense of the word, though calculated to save the prifoner from the peine forte et dure.

See Mr. Emlyn's Preface to the State Trials.

of standing mute, there would be no temptation to commit the offence; which, in the present state of the law, is generally founded on the becoming principle of parental tenderness.

man before the close a war best on lebels of the § 9. It was formerly usual for the prisoner, If he thought the charge indefenfible, to confels the indictment, and be admitted, on his own request, to become an approver against others of the same felony; upon the conviction of whom, he was entitled to his pardon. This practice never was prohibited by law, but gradually discouraged and disused; " for " the truth is (faith Sir M. Hale) that more " mischief hath come thereof by false accu-" fations of desperate villains, than benefit to " the public by the discovery and convic-" tion of real offenders." Yet I observe with reluctance, that certain modern acts of parliament f have in some degree unwarily revived this dangerous doctrine, by the frequent offers of rewards and pardons to capital felons, on discovery and conviction of

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f 4 and 5 W. and M. c. 18. so and 11 W. III. c. 3. 5 Ann. c. 31. 29 Geo. H. c. 30. 6 and 7 W. III. c. 17. 99. 6 Geo. I. c. 23. 8 Geo. II. c. 20.

their accomplices; and in some instances s, it is expressly provided, that the sums of money to be given to the apprehenders, and convictors of felons, shall not incapacitate their teltimony. The price of blood should in no case receive the legislative fanction.

In Italy (fays Puffendorf) pardons are sometimes promised by public edict to any of the banditti, that shall bring with him the head of another of the same gang. It may be good policy to raise mutual jealousies among villains; but there is something horrid in the idea of murder, by law established.

5 10. But, if the defendant thought it advisable to plead, he was entitled first to pleas declinatory of his trial; namely the plea of fanctuary, which was followed by attainder, and forfeiture of land and goods h; and the plea of clergy, which foon ceased to be pleaded, until after conviction; it being more beneficial to the party, to take the chances of an acquittal in the course of the trial.

^{8 8.}Geo. H. c. 16.16 9. h Upon the actual abjuration, 2 Hawk. 52. Finch, 389. 3 Inft. 217. in his present to the Of

Of the former of these pleas I have already given a short account; and I feel little inclination to enter more largely on the latter. Mr. Justice Foster has very forcibly observed, that " it was an absurd distinction " between subject and subject, originally ow-" ing to downright impudence on the one " part, and to mere fanaticism, or amazing " pufillanimity on the other i." During a long course of years, it exempted convicted offenders, if qualified for holy orders, from the punishment of offences of the most atrocious kind, murders not excepted. And in many cases a conviction, and having clergy, conduced more to the safety of the prisoner than an acquittal. For he was thereby, until ftat. 8 Eliz. discharged of all crimes committed before clergy had; but if he had been acquitted, he was liable to answer for any others committed prior to his acquittal k. The reading of a scrap of Latin, " Miserere mei, Deus," called with great propriety " the Neck verse," was the criterion of this senseless privilege. Women, and all persons unable to read, were exposed without mercy to the literal rigour of the law. It

i Foster, p. 306.

k Kelyng, 103. Dyer, 214. 1 And. 112.

was a great offence in jailers to teach criminals to read during their imprisonment, previous to their trial; " Per caufe de falvation de leur vie, et defturbation de la common ley, " en deceit del roy \" Many illiterate persons were actually executed for clergyable felonies; and Lord Chief Justice Kelyng informs us, that he, in the year 1665, fined a bishop's chaplain, for having reproached his facred function, and abused the court, by answering " legit" upon the demand of " legit aut non legit?" Whereas in truth the prisoner, when examined by his Lordship himself, could not read, and was thereupon not admitted to bis blergy, briefrishme our ob felices, in the intent of a dinamental

Women, in cases of grand larceny to the value of ten shillings, were admitted to clergy by the 21 James I. The wall of partition was at last entirely removed by the statute of 3 & 4 W. & M.; which entitles women to the privilegium clericale, equally with men; and by the Fifth of Queen Anne, which abolished the whole ceremony of reading.

¹ Liber Afif. p. 138. Observ, on the ancient stat. p. 351.

Here it is to be wished, that the legislature had advanced one step further, to an open declaration, that all offences, proper in the first instance to be exempted from capital punishment, and now called clergyable, should hereatter, in that first instance, either be subiected to some inferior species of chastisement, or be considered as pardonable, with a power to the Judges to transport the convicts, whenever the dangerous nature of their crime and character should make it expedient m. At present, such offenders, upon conviction, being made to kneel, they know not why; and to pronounce an expression, which they do not understand; find themfelves, in the height of their amazement at this cabaliftical ceremony, once more upon the wide world in perfect liberty. It is wonderful, bow much the exemplary solemnity of justice may be disgraced by trivial absurdities. Beades, from the rule that this privilege cannot be pleaded more than once (except by clerks in orders, in regard to whom it is

m As was enacted in the cases of great and petty larceny, by statutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. which provisions however do not extend to Clerks in Orders.

still unlimited) it follows, that, when a man commits two offences, both clergyable in their class, but totally different in their kind, as manslaughter and larceny, he must suffer death for the second, though in the eye of reason it hath no perceptible connection with the first.

§ 11. But to return to the ancient mode of profecution. Let us suppose the prisoner to have pleaded, "Not guilty." Here began his trial; and in the progress of it he was exposed to such dangers, as left him but little security even in the strictest innocence.

The use of Counsel was permitted only on the part of the prosecution, "because (saith Sir E. Coke) that the testimony and proof of the crime ought to be so clear and manifest, that there can be no desence of it." This humane reason existed in speculation only; for the ideas of our ancestors, as to the clearness and sufficiency of testimony, and proof were extremely unsettled; and it may almost be afferted, that, so late as the whole sixteenth, and part of the seventeenth Century, the first and most essential principles of evidence were

n 3 lnft. 29.

either unknown, or totally difregarded. Depolitions of witnesses, forthcoming if called, but not permitted to be confronted with the prifoners; written examinations of accomplices, living, and amenable; confessions of convicts en di bana ne perdepublic convection di ha

· The instances are infinite; I select the following on account of its collateral matter. " Then Mr. Attorney (Sir Ed. Coke) took in hand the evidence against Sir G. Merrick, and Mr. Cuffe. To Cuffe, Mr. Attorney faid, that he was the arrantest traitor that ever came to that Bar.—And still following matters strongly against him, told him, that he would give him such a Cuff as should set him down: and thereupon called to have read the (tate) Earl of Essex's confession, and also a part of Sir Henry Nevil's confession; which were both full and plain against him, as he had not to answer them." State Trials, vol. vii. p. 59.

But the trial of Throckmorton in the preceding

reign, before many Judges of the first eminence in that Winter was read against him; and he was told, that if he should defire it, he should have Winter to justify it to his face, the confession of the Duke of Susfolk who had been executed on the same accusation was also read against him; the testimony of Vaughan then under sensence of death for the same fact was received in support of the profecution; the testimony of Fitzwilliams offered in favour of the prisoner was rejected, and the prisoner acknowledged that it was unusual to examine witnesses against the Crown. A part of his own confession was read against him; and when he requested that the whole might be read, he was answered, "that it would be but loss of time, and would make nothing for him." Laftly, when he defired that an Act of Parliament might be read, he was answered, that it was not the business of the Court to find books for him, and that the ludges were to resolve all doubts in Law.

State Trials, Vol. i. p. 63.

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lately hanged for the same offence; hearlays of those convicts, repeated at second hand from others; all these formed so many classes of competent evidence, and were received as such, in most solemn trials, by very learned Judges.

during the pleasure of the professor 2, and It was fometimes agreeable to the counfel for the Crown, and fuitable to the nature of the case, to conduct the proofs by parole testimony; a circumstance most unfavourable to the Defendant, as it tended to throw the whole weight of credibility into the adverse scale. For the person secused was rarely permitted to call witnesses to his exculpation, and, even when indulged for fat. he was not in any case allowed to exemine them upon oath. At the same time, there was frequent practifing on the hopes and fears of the witnesses by the alternate encouragements and menaces of the counfel for the profecution; and juries were reminded, that, for verdicts contrary to the inclination of the court, they were liable to unlimited fines and imprisonments. This indeed they had learnt by fatal and re-iterated experience; but they were rarely in want of any memento; for it was a common, and very lucrative practice 0 3

practice with the sheriffs, to return juries so prejudiced, and partial, that, as Cardinal Wolsey observed, "they would find Abel guilty of the murder of Cain P."

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The Judge held his office, and income, during the pleasure of the prosecutor 4; and was often actuated by an intemperate zeal in the support of the charge; as if his indignation at the offence had stifled all tenderness towards the supposed offender.

Thus, ignorant of the forms and language of the whole process, unaffifted by counsel, unsupported by witnesses, discountenanced by the court, and baited by crown-lawyers, the poor bewildered prisoner found an eli-

P Observations on the ancient statutes, p. 360.

q It may safely be affirmed, that the present independence of our Judges is the best safeguard of our constitutional liberties. The stat, 1 Geo. III. c. 23, engrafted on 13 W. III. c. 12. hath completed that independence, in regard to the King, his Ministers, and Successors; and in the security of the full salaries during the continuance of the commissions. Yet it deserves serious consideration, whether those salaries, amids the general opulence of the kingdom, be more than barely sufficient to support the state and dignity of the offices to which they are annexed. It is of essential importance to every individual in the nation, that the seats of Justice should continue to be filled by men the most eminent in their profession for Wisdom, Learning, Experience, Benevolence and Integrity.

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§ 12. This short sketch of the administration of criminal justice in the sixteenth century diminishes the surprize, which we should otherwise feel, when we are told s, that in the reign of Henry VIII, seventy-two thousand criminals were executed; which, upon an average, is nearly equal to six every day, Sundays included. The same authority assures us, that executions were reduced to about one sists of this proportion in the latter end of Queen Elizabeth's reign. The annual number is at present estimated at one hundred.

Thus "when people of all ranks and con"ditions had, in their turn, been taught
"moderation in the School of adversity,"
Reason and Mercy gradually prevailed; but
an ample field is still open to the exertion of
their influence,

The perulal of the first volume of the English State Trials is a most disgustful

r Holingshed. See Observations on the ancient fatutes, p. 402. 8 Foster, 235.

drudgery; but it is impossible to survey that chaos of oppressions, so long existent, and so patiently borne, without being astonished at the foundation, on which the beautiful fabric of our present liberties is raised,

C H A P. XVII.

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Of other Crimes immediately relative to the State.

be considered all offences, below the degree of treason, which amount to violations of the prerogative, or infractions of the public peace; and, in short, all the inferior offences, which directly affect the King, and his government.

It is faid, that in Japan, every breach of any law of a public nature, and every disobedience to the ministers of justice, is considered as a personal affront to the Emperor, and punished as a capital crime. The consequence

A fimilar account is given of the course of justice in Peru, where every crime is considered as a breach of the comfequence is evident: the Emperor's authority is univerfal and unlimited. An authority for unnatural is not likely, if it be allowed possible, to be supported, without a constant violation of the rights of nature.

The human mind is delighted with the exercise of power, and at the same time incapable of indulging an extreme eagerness in any pursuit, without running into absurdity. Hence it follows, that the penal laws of despotic states are both wanton and sanguinary; adapting the punishment of death, like the bed of Procrustes, to offences of all sizes and denominations. Very different should be the sentiments and practice of that envied nation, which hath discovered, and established, a permanent system of government, in the happy medium between lawless liberty, and absolute despotism.

§ 2. An accurate examination of this species of crimes would lead me into a tiresome detail; I shall confine myself to some of the most striking instances.

commands of the Ynca, who is reverenced as fomething more than human. Garcileffe de la Vega, Com. Reg. J. ii. c. 12, 13.

Defenion

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The mere knowledge and concealment of treason, without any degree of assent thereto, is called in our law, a misprission of treason; and is punished with the loss of the profits of lands during life, forfeiture of goods, and imprisonment during life v. It is also by 14 Eliz. c. 3. a milprision of treason to forge any foreign coin, though not made current by proclamation. By statute o Ed. III. stat. 2. no. sterling money shall be melted down, upon pain of forfeiture thereof. This law is written in a very different spirit from the statute 8 and 9 W. III. c. 26, which enacts, that, if any person shall receive, or pay any counterfeit, or diminished money of this kingdom, at a less rate than it shall import to be of, he shall be guilty of felony, berevecho chad don'w

By 9 Geo. II. c. 30. enforced by 29 Geo. II. c. 17. if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without licence under the King's sign manual, he shall be guilty of selony without benefit of clergy—a very severe law!

Defertion

Ph. and M. c. 10. Previous to which flatute, every concealment, under the confiruction of aiding and abetting, feems to have been confidered as treason.

Desertion from the King's armies in time of war, is also made a capital felony by 3 Edw. VI, stat. 2, and the offence is made triable by the justices of every shire. This offence was subjected by the laws of Canute to the loss of life and lands w.

Prison-breaking by the offender, when lawfully committed, was at the common law a felony in every case; but by stat. I Edw. II. no person shall for breaking prison have judgment of life or member, except the cause for which he was imprisoned would

m "Servus etiam aufugiem a domino suo vel a socio suo per segnitiem suam, sive set in navali expeditione, sive in terrestri, perdat emme quod babet, et propriam vitam, et capiat dominus possessionem illam ac terram ejus quam ipsi prius dedis. Et se propriam terram babeat, regis manibus que tradatur." Leges Canuti 75.

It was anciently the custom in France to cut off the

It was anciently the custom in France to cut off the ears, or slit the nose, of the deserter; "and it was absurd, says Montesquieu, to relinquish this practice for the punishment of death. Soldiers are habituated to the contempt of death, and the dread of shame; so that the terrors of the penalty were diminished, while they were intended to be increased." L'Esprit des Loix, I. vi. c. 12.

Charondas, the lawgiver of the Thurians, enacted that deferters should be compelled to fit three days in the market place cloathed in temple dresses; and this law, says the Historian, excelled the provisions of other lawgivers on the same subject both in humanity and wisdom. Knirdo pde his desders, a making these has comply programs. Diod, Sic. I. xii. c. 16.

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have had such judgment, if he had been duly tried and convicted, seeing older at how to

and their Executive straight blanch the wint Our law, even with this mitigated feverity, feems to bear, with lome degree of harshness, against the natural impulse of selfpreservation *.

"Prilan breaking by the click lets, while the

The rescue or forcible freeing of another from an arreft, or imprisonment, is also, in many cases, a felony without benefit of clergy and a said to make

Since the confirmation as well and a collection

The unlawful affembling, to the difturbance of the peace, by any twelve persons, who, being so affembled, shall continue together for one hour, after proclamation made to disperse, is capitally punished by statute, 1 Geo. I. c. 5. when or the two scient of the defer pender of independent will be the

All foreible acts of imageling, carried on in defiance of the laws, are by fat. 19. Geo. If,

I shall transcribe the words of a very ancient writer

on this subject:

"Abusion est a tenir escape del prison, ou de bruserie de gaole, per peche mortelle, can cell usage n'est guerant per nul ley; ne en nul partie est use, forsque en faire per ley de nature. Myrror, p. 283. c. 34. made felonies without the benefit of clergy.

In this branch of the penal festem, lawgivers should be extremely cautious, not to confound atrocious breaches of the civil contract, with simple violations of the police.

Caha A P. A XVIII. months

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There is to method in the first with a selft.

of Murder.

A N English gentleman, ignorant of English law, (in which predicament there are some) would probably confine his ideas of homicide to the two divisions of "murder" and "excusable killing;" and, when informed, that the law of England comprehends several other classes, both in name and punishment, would profess himself unable to discover any ground of further distinction.

"The act of homicide (he would say) is either murder, or it is not so. The intention of the killer is the criterion; and the
malignity

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" malignity of that intention is in the nature " of a fingle, controverted fact, subjected to enquiry, and capable of ftrict proof. " that malignity be not fuggefted, or if on " fuggestion it be disproved, the act of kill-44 ing becomes, as to civil guilt, negative, " and excufable." To anothering a desired

There is something in the first view of this polition very plaulible. An English lawyer would give the following answer to it.

"The act of homicide is either occasioned " by mere accident, or founded in the difs pensations of public justice, or in self-pre-" fervation, or in a fudden transport of passion. or in malice; and, in these different views, it is capable of a great variety of gradations, " from absolute innocence to the most aggra-" vated guilt.

" True (it would be replied); every crime " hath its proper degree of enormity, variable as the mind of the criminal; but you mif-" apply the property of the crime to the act " on which the crime is founded. That act, " in itself, and abstractedly considered, is a " fimple Thoplan

" fimple consequence of the attributes of

" matter ; unfortunate indeed and pittable ;

" but neither culpable nor punishable, until

" it be proved to have co-operated with a mif-

" chievous intent. When that proof is given,

" then, and not before, it becomes criminal,

" under the appellation of murder."

Here then we are reduced to state the law as we find it; and to leave its doctrines to their own support and defence.

§ 2. I begin with that class to which our laws annex no idea of guilt; and which is called justifiable homicide. It is founded on necessity, and, in some instances, on the positive precept of law.

Such is the case of the Judge who passes sentence of death upon a convicted criminal, and gives the warrant for his execution; and such, more immediately, is the case of the Sheriff, who causes that warrant to be executed. On this point it hath been holden y, that, "if the execution vary from the judg-

y Hale's Hist. P. C. ii. 411. And Bracton, 1. iii. p. 104. " non alio modo puniatur quis, quam secundum quod se babeat condemnatio."

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But this must be understood of such a varying only, as tends to aggravate the punishment beyond the intention of the law; not of any mitigation, in regard to the pain, or infamy of the sentence, at the same time consistent with the substantial justice of the case.

and said profile at inscaling said second transfer

Women, convicted of either high or petty treason, are directed by judgment of law to be burnt in the fire, till they be dead; yet Sheriffs have generally had humanity enough to direct them to be strangled before the fire can affect them. It is the sentence of traitors, to be hanged by the neck, but not till they be dead; yet it is now the practice, and very properly, not to suffer them to be cut down, in order to the subsequent mangling of their bodies, whilst any appearance of life remains.

² Foster, p. 269.

Ashton, Jan. 19, 1690, at the Old Bailey; and Matthews the printer, Oct. 31, 1719, at the same place, were sentenced for high-treason; and were hanged until they were dead, without even any subsequent quartering or beheading. State Trials.

Upon the same principle of mercy, a curious doubt hath arises on this sentence of treafan whether of the King should in any case femit all but the hanging, it would not be murder in the Sheriff, to hang the criminal until he be dead od live of shwarls control

tion seconity the law will swach a regrous But I proceed to that homicide, which is Justifiable by permission of law; and such it is, when any man relifteth persons in the due course of justice b, having authority to take, or imprison him, though perhaps he may be innocent, and is killed in the struggle. This rule is founded on reason and public utility; but there hould be an apparent necessity on the fide of the officer, viunties after befreen ed at

The fame benignity of construction is extended to homicide, committed by any perfon, interpoling to preserve the public peace, and prevent mischief; for such interposal is a breach of focial duty.

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b The anciene expression, in the case either of slight, or of resistance, was, "quod justiciari se non permitt."

Pasch. 16 Ed. III. coram regs., Rot. Norst. "Vicecomes domini regis, qui interfecit dues latrenes non permittentes se justiciari, acquietatur."

In like manner, officers, endeavouring to disperse a riotous or rebellious affembly, are juffifiable, both by the common law and by flatute though death flould enfue. But bere also there foould be an actual, existent noceffity, otherwise it will be murder; and of this necessity the law will exact a rigorous proof. And though it hath been adjudged, that those who attend the Justices, in order to fuppress a riot, have power to take with them fuch weapons, as shall enable them offedually to do it; yet the milapplication of that power to wanton or tyrannical purpofes, will be most severely construed. It is indeed a power dangerous to the confitution, and to be guarded with jealoufy against all abuse.

Laftly, homicide is justifiable in the refistance of any capital crime, attempted and accompanied by violence. As in the case of

c Hale, H. P. C. i. 465. Hawk. P. C. i. 161. Popham, 121, 122. And stat. 1 Mary, c. 12. 1 Eliz. c. 16. which were both temporary acts. And 1 Geo. I. c. 5. to the same purport; which is perpetual. If Hawk. P. C. i. 161. § 21.

"Hadrianis restricted was, qui supram sibi, well fuit, per vim inferentem occidit, dimittendum the Dig. I. xlviii. t. 8. § 1.

any woman, who kills a ravisher in defence of her chastity; or of any traveller, who, in the immediate defence of his property hoots a highwayman, or of any person who kills another in an attempt to commit burglary. The fame idea prevailed in the civil law. Furem nocturnum si quis occiderit, id impune feret, fi parcère ei sine periculo suo non potuit. And again, fi quis percufforem ad fe venientem gladio repulerit, non ut homicida tenetur; quia defensor proprie salutis in nullo peccasse vide-Twisten, Juli co, renombered a rate in which will proposed a rate in which will be provided by the adelicate stumiliarity

But here it is observable, " that our law "will not fuffer any crime to be prevented "by death, unless the same, if committed, would have been capitally punishable s." Hence it hath followed that, though it be lawful for a man to kill another, whom he detecteth in the night-time, in the act of carrying away his property; yet if he take another in the act of adultery with his wife, and kill him, it will be manflaughter and felony. Such is the law, though in fact it hath been executed with great benignity. And furely,

Want befinkly's find to the tal gand

f Domat. 1. ii. p. 638.

g Commentaries, B. W. 102.

h John Maddy was (23 C. II. in B. R.) indicted for murder, and the jury gave a special verdict; " that he

if the former cale be justifiable, the latter, though it favour more of fudden revenge, than of felf-prefervation, ought to be fo a fertion; for adultery is the highest invasion of property. The Athenians i comprehended both thefe as so lame, idea gravalled in the civil law

attention of any for any occidence coming into his house, found the deceased in the act of adultery with his wife, and immediately firuck him with a joint stool on the head, so that he died; they also found that there was no precedent malice, and the court were all of opinion, that it was but man-flaughter, the provocation being exceeding great; and the executioner was directed to burn him gently." But Twisden, Justice, remembered a case, in which the prisoner, being informed of the adulterer's familiarity with his wife, faid, that he would be revenged on him, and afterwards, finding him in the act, killed him, which was held by Jones to be murther. Ventris in 159. Raymond 212.

A fine comment on this Law of the Athenians may be found in the Oration of Demosthenes, Kala

weimen.

The Athenians not only gave the confirmation of justifiable homicide to the death of the adulterer; the injured hufband was, by another law, permitted to exercise his vengeance in whatever manner he might preser. "Si quis adulterum in ipsa turpitudine deprehenderit, de co, quod libuerit, framito 19 and yours mary

Opinion pings of the publisher to the pain of the Oundry yas ich into.

Py. Ille ubi rescivit factum, frater violentissimus. Pa. Quidnam secit? Py. Colligavit eum miseris modis.

Pa Colligwoit? . Py. Meque squidem prante, it ne id fu-

Pa. Quid ais? Py. Nunc minatur porre, sese id, quod marchis solet:

Quod ego nunquam vidi fieri, neque velim, mo) bolibat (18 a 11) For Lunuch. V. 6, 41.

willier, and the jury gave a facilal (could; " that he

cases in the same law, and permitted no degree of punishment in either of them. If it be true, that positive laws, contradictory to natural sentiment, are cruel and dangerous; it is an imperfection in our system, that it hath not adopted the same regulation.

§ 3. The next species is Excusable Homicide; and first, per infortunium; as when a man doing an act, not unlawful, and without a mischievous intention, and using proper, that is, usual, or ordinary circumspection, happeneth to kill,

If however the act, on which death enfueth, be unlawful only as malum probibitum; if (for instance) it should consist in shooting at game without a statutable qualification, it

Necat bie forro, secat ille cruentis Verberibus, quosdam machos et mugilis intrat.

Juv. x. 315.

Ab tum te miserum, malique fati, Quem attractis pedibus, patente portà Percurrent rapbanique, mugilesque,

RUGIT

Catull. xv. 17.

See also Aristoph. Plut. ver 168.

The Roman Law, in some degree, permitted the killing of the adulteress. Is, qui uxorem in adulterio deprebensam occidit, humiliore loco positus, in exilium perpetuum dandus; in aliqua dignitate positus, ad tempus celegandus. Inst. 1, 1, 5,5.

is not under that description to be considered as an unlawful act.

the relief that between their court and first is no

Secondly, by self-defence; as when a perfon, in the course of a sudden and dangerous affray, which leaves no power, consistently with security, to wait for the intervention of the law, retreats as far as he can with safety, and, urged by mere necessity, and to avoid his own death, killeth his adversary.

This idea is finely expressed by Cicero in his oration for Milo. "Est igitur, Judices, bec non scripta, sed nata lex; quam non di- dicimus, accepimus, legimus, verum ex natura ipsa arripuimus, bausimus, expressimus: ad quam non docti, sed facti; non instituti, sed imbuti sumus; ut si vita nostra in aliquas insidias, si in vim, si in tela aut latronum, aut inimicorum incidisset, omnis bonesta ratio esset expediende salutis: silent enim leges inter arma; nec se expectari jubent, cum ei, qui expectare velit, ante injusta pæna luenda sit, quam justa repetenda."

But in both these cases of homicide, by mere accident, and by self desence, it must appear, that there was no deliberation pre-

The bounds faw, in fome dester, paraliced the left

vious to the act; and even then, they are by our law k subjected to forfeitures, not only of the thing, or inftrument, which was the immediate cause of the death, but of the goods or chattels of the party. The latter have long been remitted in both cases, upon a pardon under the great feal, and a writ of restitution; and to prevent such expence, in the case of homicide per infortunium it is usual for the judges to recommend a verdict of acquittal.

hamiende by Kil defence: Bet in is difficult

And here it is well observed by Mr. Justice Foster 1, that " Judges are ministers, ap-" pointed by the crown for the ends of pub-" lic justice, and should have written on their " hearts the folemn engagement of their " king in his coronation-oath, to cause law " and justice in mercy, to be executed in all bis " judgments; that it is not therefore the " part of judges to be perpetually hunting " after forfeitures, where the heart is free " from guilt; to heap afflictions on the head " of the afflicted, and to wound a heart al-" ready wounded past cure." And furely, it may be added, that it cannot be the part

k Ever fince the flatute of Gloucester, & Edw. L. A. 1 Foster, p. 264-

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of lawgivers to permit forfeitures in such cases.

A great writer apologizes for such forseitures m, by supposing the law to set so high a value upon the life of a man, that it always intends some missehaviour in the person who by any means takes it away; presuming a faulty negligence in the case of misadventure, and an unknown wrong or provocation, in homicide by self-defence. But it is difficult to conceive a mixture of criminality in mere accident, or that there can be "necessives cul"pabilis," in self-preservation. The law should be an indulgent parent, not an ungenerous step-mother.

It is indeed the duty of law, if I may be allowed the expression, to look with a very jealous eye on every action which hath a tendency to bloodshed; and it may by some, perhaps, be thought the wisdom of law, to affix some mark of disapprobation on every actual instance of bloodshed, however casual or blameless: but it is repugnant both to the duty and wisdom of law, to seek any ends by

m Commentaries, B. iv. 186.

the harsh and unseemly intervention of subterfuges and fictions. The candor of legislation should ever be invisiable.

distinguished automobile of the best for the

The true cause of forfeiture, in cases of excusable homicide, was well known to our Saxon and Norman Kings; who did not feek any refinements of reasoning to support this very confiderable branch of their royal revenue. They believed themselves to possess a valuable, afcertainable property in the lives and limbs of their fubjects. Fines therefore were imposed in all cases of death and mayhem, and proportioned to the degree of the person killed or hurt. In the earlier periods of our history, a fine, or composition, was given to the relations of the deceased alfo ". But when judges, properly fo called, were established; and when individuals had given up the right of avenging their own

The same notions prevailed among the ancient Germans; " Equorum, pecerumque numero convisti multantur; pars multa regi vel civitati, pars ipsi, qui vindicatur, vel propinquis ejus exsolvitur." Tacit. de M. G. c. 12.

n Si mulier occidatur prægnans, et puer in ed fuerit vivus, uterque plend werd (Vir-gelt, the price of a Man) reddatur; si nondum vivus sit, dimidia werd selvatur parentibus ex parte patris." Vide Leges Henrici & c. 70. which contain many curious particulars on the subject of compositions.

wrongs; the whole of this traffic was gradually transferred from private hands to the public treasury. The innocence of the intention, says a law of Henry the First, shall make no difference o as to the composition; five Sponte, aut non sponte finnt bæc, nibilominus tamen emendetur : Que enim per inscientiam peccamus, per industriam corrigamus. Such reasoning tended to annihilate all distinction between voluntary and involuntary acts; compositions for crimes became as common in the courts, as compositions for fins in the churches, and they were extended even to the most atrocious murders, in the same manner as to accidental deaths. Earl Godwin was adjudged by the Wittenagemot, to pay twelve handfuls of gold to Edward the confessor for having killed his brother; and the hundred of Boctone p was fined two marks for the default of a certain maid fervant, who was present, when a horse struck a man, and killed him

: ABBOTH

Yet there seems some reason to collect from Bracton, that, by the common law, there were no fines on death per Infortunium; except in places where a contrary usage had particularly prevailed. A Item, de iis, qui morsui sunt per Insortunium, nullum erit Murdrum, lices in quibusdam partibus de consuetudine aliter observe-tur." De Coron. c. 15. § 6.

It feems however to be the better 9 opinion, that in the cases of homicide per infortunium, or se defendendo, the forfeiture of the whole never was incurred at common law. For it was not unufual, to pay the mulct or fine in horses, hounds, hawks, honey &c.; and if the person who had committed the Homi-

mapels 33

I SALT OF STRUCKS SHELL

(Co. Line 123. 2.

⁹ Foster, p. 287.

This fine was called Murdrum.

[&]quot; Vicecomes reddit compotum de x Marcis pro uno

murdro in hundredo de Hereford." " Liulfus de Alstredaga reddit compotum de cc Marcis argenti et x fugatoribus, et x accipitribus pro morte Gamel, in thesauro xL Marcas Argenti; et de-

bet CLX Marcas argenti, et x fugatores et x accipitres."

"Stephanus filius Erchem-baldi reddit compotum x marcis argenti pro interfectione hominis Willelmi

Odo filius Alfi debet LXs pro occifione filiorum Jocbi.
Oliver de Cail and others fine pro eadem occifione."
I have selected these instances from the reign of King

Stephen. See Madox, c. 14. 6. In the same sense the word is used in the 26th chapter of the Stat. of Marlbridge. " Murdrum de cætero non adjudicetur, ubi infortunium tantummodo adjudicatum est, sed locum habeat murdrum de interfectis per

feloniam tantum." Fines, as a composition in cases of wilful Murder, are at this day common in Mahometan countries, and are established on a positive precept of the Koran. See b. i. chapter of the Cow; (and Chardin, Voyage de Perse, t. ii p. 299) " If any one forgive the blood of his brother, he may pursue the malesactor for damages and interest; but he who shall injure the wicked after having received satisfaction, shall in the day of judgment suffer the most grissoms someons."

cide were too poor to pay it, or had fled, or could not be discovered; the Vill, wherein it was committed, or, if that were too poor, the whole hundred was subjected to a fine.

tackette, becate brades know considered

The same ideas seem to have prevailed in all the cotemporary governments of Europe, and the principle, on which they were founded, appears to have retained a very lasting influence in our laws.

"Vita et membra sunt in manu regis, says
"Sir Edward Cokes, nay, the Lord of the
"Villeine, for this cause, cannot mayheme
"the Villeine, but the King shall punish
him for mayheming of his subject; for that
hereby he hath disabled him to do the
"King's service, by fine, ransome, and imprisonment until the fine be paid." "And
in my circuit in Anno 11 Jacobi, in the
"county of Leicester, one Wright, a young,
strong, and lusty rogue, to make himself
"impotent, thereby to have more colour to
beg, or to be relieved without putting him.
self to any labour, caused his companion
to strike off his left hand, and both of

" them were indicted, fined and ranfoined

therefore and that by the opinion of the " reft of the Judges." A state on and mand

windly dischool committee of any and the flower

The law of Spain, far from allowing for feitures in homicide by felf-defence, gravely observes ", " that it is better for a man to " defend himfelf, when alive, than to leave " it to others to avenge him, when he is thundries. This though in the fact of the within the benefit of clegar, is made highly

As to homicide per infortunium, it is true that it was subjected by the Athenians to banishment for a year; but it should be obferved, that this was not in the nature of a punishment, but rather a protection w to the unfortunate person from the impetuality of revenge; for if, previous to his departure

1 The Breeze to Style

That the state of the state of

t By a declaration of Lewis XIV, A D. 1677, " les criminelles condamnés à servir sur nos Galeres, comme

criminelles condamnés à servir sur nos Galeres, comme forçats, lesquels après leurs jugamens auront mutilé ou fait mutiler leur membres, soient punis de mort pour reparation de leur crime," Code penal. 139.

V See the Observations on the ancient statutes, p. 55.

W See Eurip. Orest. vor. 611—618. and the Iliad, l. xxiii. ver. 85. and Petit. Leg. Att. p. 600. "Qui alium casusfortuito peaâsse, in annum deportator, donce aliquem e cognativ eccifi placésse; revertitor veto peractis sacrivet lustrationibus."

A full comment on this Law may be found in the latter part of the Oration of Demosthenes against Naulimachus.

or during his absence, he were able to satisfy the relations of the deceafed, the exile ceafed from that moment. And indeed the Athenia ans x, as well as the Romans, feem to have formed very clear diffinctions upon the different inflances of homicide, signal at aspecial

observes ", " that it is betten for a man to § 4. The English law describes a third species of homicide under the name of manflaughter. This, though in the first instance within the benefit of clergy, is made highly criminal and felonious; and the offender shall be burnt in the hand, and forfeit all his goods and chattels. And if for any previous felony,

The ingenious writer of the " Historical Law Tracts" feems (p. 33.) rather inadvertently to have made a different affertion. The words of Solon's Law are very remarkable, the solution of the second and resignated in secondar. Again the punishment of death was annexed to wilful mur-der, The in wegovilar arrowlers has Dana ro Enpaison. And if the Murderer withdrew before conviction into banishment, he was subjected to a total forfeiture; but the other instances of homicide were not liable either to corporal punishment or forfeiture, and allege at

The Roman Law proceeded expressly on the same principles; In Malesciis voluntas speciasur. And Hadrian declared by Rescript, "Eum; qui bominem occidit, si non occidendi animo boc admiste, absolvi posse: leniendam panam ejus, qui in rixa, casu magis quam voluntate homi-cidium admissi" And by another Rescript of one of the Emperors, " Infans wel furiofus, fi bominem occiderit, lege Cornelia non tenetur : cum alterum innocentia confilis

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and to min party sale, by there more

as for lending live theep out of the realm, of for harbouring offenders against the law of customs, or for having solemnized a clandestine marriage, or for any other fact of the most foreign nature, he should have used his plea of clery, not being a clergyman, he is then in the first instance of manslaughter subjected to the pains of death.

I have stated the punishment previous to the definition of the offence; because many most ingenious and learned writers have, on this subject, as on many others, expatiated, with more liberality, than reason, on the merciful disposition of the English government; as if it were their object rather to write the panegyric, than to make known the imperfections, of the constitution.

We are told , that the benignity of our law imputeth manilaughter to an infirmity, which is incident to the human fraint, yet manilaughter is a capital offence. We are told , that our law pays thich respect to human frailty, as not to much pattern and a deliberate act upon the fame level of guilt; yet it will appear,

Foster, p. 290. Commentaries, B. iv. p. 191

seile

that both manflaughter and murder may be committed, without any intent to do personal mischief, and without any mixture of deliberation whatever, on for on the outliness on Rob

must force or nature, he should have used his Manslaughter is agreed to be, the killing of another without malice, express, or iniplied; either voluntarily, upon a fudden heat; or involuntarily, in the commission of an unlewful act min of the lutwelluna

the definition of the offence; because

Voluntary manflaughter, (which being an act of homicide without either a legal or a personal necessity, is therefore neither justifiable nor excusable,) ensuch most frequently upon forme provocation given, or supposed to be given. But words of reproach, and contemptuous gestures, are in no case sufficient to free the party killing from the guilt of murder*, unless the killing be in consequence of a blow given in a toanner, and with a weapon, not likely to kill b, or unless, upon the immediate quarrel of the parties, they proceed to blows or fighting; fo as to make the whole transaction one continued set of

Hale, 473. 3 Cro. 779. In the affeatibly of the Judges, 18 Car. II. this point (fays Lord Chief Judice Holt) was positively resolved." Kel. p. 130.

See the case of John Grey. Kel. p. 64.

passion

passion or sudden affray, in which no undue advantage is taken on either side.

There must be some actual assault upon the person killing, to soften, what would otherwise be an act of murder, into man-slaughter. But even this indulgence is confined to that sudden impulse of passion, which is supposed to be irresistible; for, if there should appear to have been a sufficient interval for the voice of reason to be once heard, the act of homicide will then be attributed to the malignant principle of deliberate revenge, and will receive the name and punishment of murder.

It was enacted in the reign of Henry II, that if any were killed at any jouft or tournament it should be no felony; " for that in friendly manner the parties contended to try their strength, and to be able to do the King service in that kind as occasion should be offered "."

Involuntary manshaughter happeneth in the case of accidental death, ensuing upon an act

there, and the built I had been the end of

Mirror, c. 1. § 13. des Adventures.

unlawful

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unlawful as malum in fe, but in the nature only of a trespass. But, if the homicide he in consequence of an act felonious in itself, or in prosecution of a felonious intent, it will be murder,

It is not difficult to illustrate this distinction by an example; though I purposely avoid any mention of adjudged precedents, that I may not be led into a long, and wearifome labyrinth of facts. It is extremely dangerous to give any extract from cases of homicide, where every circumstance weights " fomething in the scale of justice," and where imperfect reports have the most fatal tendency.

A man shooting at a bird, and using proper and ordinary caution to prevent danger, unfortunately happeneth to kill his neighbour. The guilt of this man in the eye of our law, and consequently the proportion of his punishment, will depend, partly on the nature, shape, and size of the bird; and partly on the intention of the man with respect to the bird; but will have no connection whatever with the act of homicide.

to tracks date its become now if

If the bird chanceth in evidence to prove a wild pigeon to fore nevere et unline in bonis, it will be excusable homicide; if a tame fowl, and that at for the amulement or improvement of the markimen, it will be felonious, and manflaughter, because an unlawful trespais on the property of another; laftly, if the bird were private property and intended to be stolen, which must be collected from the circumftances, it will be murder, by reason of that felonious intent Sin in 2019 military

grounds, Restles, chough in the purfuit of Such on this point is the doctrine of our law, and infinite is the variety of confirmative crimes, which have been established thereon: the instance which I have felected, is no exaggeration. - tram passes and information Militar de fodosación posición por el en

That external unconnected circumstances should regulate the nature and enormity of crimes,

d Kelyng, 117. State Trials, vol. vi. p. 222. Fol-

p. 258. On the same principle, when a man, endeavouring to kill another, and missing his blow, happeneth to kill himself; it is in judgment of our Law wilful and deliberate self-marder. See Hale, Hist. P. C. i. 413.

If In all such instances, the intent of the prisoner, which can only be collected from the circumstances, is evidently and necessarily subject to the sole determination of the

Jury : " that A. thot at the poultry of B. and by acci-

crimes, that the intention should be transferred to the accident which results from it, are positions, which, in their present extent, have ever seemed to me most preposterous and unnatural. They bear however the venerable stamp of antiquity; and the errors derived from them, if indeed they be errors, are the accumulation of many centuries.

I proceed therefore with diffident and trembling steps on this hitherto untrodden ground; fearful, though in the pursuit of truth and the defence of natural rights, of wandering into the mazes of absurdity, or

"dent killed a man," would be an infufficient verdict, on which no judgment could be given. The intent of A. with regard to the poultry ought also to have been found. "If an action unlawful in itself be done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of sact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter: not accidental death, because the act upon which death ensued was unlawful."

But quære, How this can be reconciled with another passage in the same book, which saith, " that the court, and not the jury, is to judge the malus animus, which is to be collected from all circumstances, and bringeth the offence within the denomination of wilful malicious murder, whatever might be the immediate motive to it." Fos-

the at their at the porting of B. and by asch-

ster, p. 261, and p. 257.

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finking at the fundamental principles of Government. We to instruct to the principle of This may be required to the principles of the principles.

It is true, that crimes are to be estimated, in some degree, by the actual mischief done to society; because the internal malignity of mankind is not within the cognizance of human tribunals.

But, if this polition were received in its fullest latitude, it would prove too much ; it would prove that every act of homicide is equally criminal, and that the intention is in no case to be considered. The following refriction should then be observed as inviotably connected with the principle of Every member of Society bath a right to do any act entibout the apprehension of other inconveniences, than those robich are the proper confequences of the act infelf; for it is the right of every member of fociety to know, not only when he is criminal, but in what degree he is fo. This is the great boundary of political liberty; which gives way to infecurity and danger, whenever the arbitrary inferences of magistracy are admitted within its confines. Can it be faid, consistently with this principle, that the casual consequence of an intended Q 3

Deta sa

intended larceny shall be liable to receive the appellation and punishment of wilful murder? This may be reconciled to the philosophy of slaves; but it is surely repugnant to that noble and active confidence, which a free people ought to possess in the laws of their constitution, the rule of their actions.

Yet there are some cases in which it may be reasonable to carry oven the felonious intent to commit one action a different laft enfuing in profecution thereof As when a potion is given to the mother to deftroy the child of which The is pregnant, and it kills the mother py this is murder, and hath been fo adjudged s. In like mannet, "if a man lay poifon with an intent that B. hould take it " and C. by mistake takes it, and is poisoned to death; this is murder, though it were " not intended for him A" So, " when a "man intending to burn one house, in exese eution thereof happens to burn another " house, this is a malicious and felonious " burning, for it fprings out of a malicious and dampet, whenever the aroundry inferences

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men tributale.

t By Sir M. Hale, at Bury, A. D. 1670. Hale's Hist. P. C. i. 429. h See Agnes Gore's cafe, Plowden, i. 474. and Hale's Hist. P. C. i. 431.

"and felonious intent"." But in all these cases it should be observed, that the consequence participates the nature of the original crime, and that the general malice of the intention is followed by a fact of the same degree and kind, and almost the general malice of the same degree

ried Cort decrees, and frequently upon When it was faid, that involuntary manflaughter happens in the case of accidental death ensuing upon unlawful acts; I ought to have added, that acts lawful in themselves, but done without due care and circumspection, are to be confidered as unlawful, and even as felonious in their construction, if done with a negligence so notorious as to imply malice against all mankind. And on this distinction. a killing, in confequence of a piece of timber or stone thrown from the top of a house into the street, is always cited in our books as an instance of homicide, which may be misadventure, manflaughter, or murder, according to the circumstances of the case.

§ 5. The offence of mortally stabbing another upon sudden provocation, not then having a weapon drawn, nor having first stricken

Child the following disconductions in the

i State Trials, vol. vi. p. 222. 3 Inft. p. 67. " the Event shall be coupled to the Cause."

at the party killing, is a peculiar species of manslaughter, which is punished as murder by a statute made in the first year of James the First, upon a special occasion:—" The offence (says Lord Raymond) confisted in the manner of doing it, because the Scots care ried short daggers, and frequently, upon differences arising at table, stabled others unprovided."

The particular grievance between the nations hath long expired; and the particular remedy provided for it ought not to have furvived.

The ingenuity and benignity of the judges have gone hand in hand in the construction and mitigation of this statute k; yet it hath proved fatal to many unfortunate persons, who have suffered, not merely because they had killed, but because they had adopted a mode

e circumflances of

k Of this the following solemn determination in the case of Page and Harwood is a curious instance. "Though in judgment of law every one present, and aiding, is a principal; yet in the construction of this statute, which is so penal, it shall be extended only to such as really and actually made the thrust; not to those who in construction of law only may be said to make it." Hale i. 468. Allen, 43. Stiles, 86.

of killing, to which the law expresses partial antipathy.

§ 6. The diffuse manner in which I have now considered the inferior instances of homicide, hath almost exhausted the subject; and it might perhaps be sufficient to add, that every remaining instance amounts to the crime of murder!, that crime at which our nature shudders.

Murder is the killing of another with malice aforethought, either express, or implied. No homicide, publicly committed, amounted to murder by the common law; for murder, according to the ancient definition of Bracton, of occulta bominum extraneorum et notorum ocoifio manu bominum nequiter perpetrata. This was remedied by stat. 13 Richard II. which gives a description of murder according to common understanding m.

The act then is not complete without the death of the party; but if the party should not die speedily after the blow, yet if he die within a year and a day, and if the wound

riva)

¹ Commentaries, B. iv. 194, m Kel. p. 125.

be the ultimate, though not the immediate cause of death, it is murder ".

And such murder is not confined to direct attacks upon life, but may be the consequence of indecisive acts, or wilful neglects, or cruelties, from which death was likely to ensue. This was the case of the woman who less her infant in an orchard covered only with leaves, in which condition it was struck by a kite, and died.

Express malice is that deliberate intention to take away the life of a fellow-creature, which is manifested by external circumstances, capable of proof. It has indeed been extended to that head of constructions which I have already mentioned. As when two or more meet together to do an unlawful act, the probable consequence of which may be blood-shed, and one of them kills a man;

h It feems however to be a harsh resolution in Kelyng's Reports, p. 26, that "If one gives wounds to another, "who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do; yet if he die, it is murder, or manslaughter, according as the case is in the person who gave the "wounds: because if the wounds had not been, the man "had not died." Newgate Sessions, 14 Oct. 14 Car. II.

fuch killing is adjudged to involve the whole company in the guilt of murder, they being prefumed to have proceeded on a general and malicious resolution against all opposers. The fact, however, must appear to have been committed firially in profecution of the purpole for which the party was assembled; and this distinction probably governed the case of Lord Dacres & in which indeed there is an apparent hardship. The park-keeper was killed without his knowledge, and far out of his light and hearing; yet in the eye of the law he was present, being at that instant engaged, though in a different part of the park, in the encouragement, protection, and support of the common enterprize. It is easy to illustrate this position by another instance: ic hath been adjudged, that "If divers perfons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an oppora funity, kills him; the rest are not con-" cerned in the guilt of that act "," because it hath no connection with the crime in contemplation.

bas

Hale's Hill. P. C. i. 534. Moore, 86. Foffer, 354.

Implied malice is that inference which arrifes from the litture of the act, though no particular malice can be proved. As when a man fuddenly kills another without any apparent provocation; when he gives poison to another without any known inducement; when he wilfully suffers a beaft, notoriously mischievous, to wander abroad, and it kills a man. The last instance is certainly a most gross misdemeanour; and Lord Chief Justice Hale thinks it a murder, as by the Jewish law 4, and mentions a report of a person being actually executed thereon.

A peculiar protection is, in construction of law, given to ministers of justice executing the ordinary process; and also to private perfons endeavouring in certain cases to arrest or imprison: the killing of such persons, though in the exertion of personal violence, is homicide committed in defiance of the justice of the kingdom, and is therefore deemed murder of malice prepense.

q Exodus xxi. 29. "But if the ox were wont to push with his horn in time past, and it hath been testified to the owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death."

And here it hath been much debated, how far acts of oppression towards individuals may authorize them, or the bye-standers in their behalf to attempt a rescue; and how far the party, whose person or property is invaded under colour of law and justice, or others interposing in his defence, and committing homicide, may be thought to have acted on a provocation sufficient to acquit them of the guilt of murder.

The justification of resistance to magistracy, attended with such consequences, must principally depend on the circumstances of each particular case; and such resistance is generally founded rather in deliberate intention, than in the venial infirmity of passion.

Yet a worthy Judge feems to have made an unpleasing distinction on this subject, between the stability of government, and the private rights of the people. "Let us (says he) suppose the case of an upright and deferving man, universally beloved and effecting the desired of the place of execution under a sentence of death, manifestly unjust.

mars &

Fofter, p. 316.

"This is a case that may well rouse the in-

" dignation, and excite the compassion, of the

" wifeft and best of men : but wife and good

"men know , that it is the duty of private

" fubjects to leave the innocent man to his

" lot, how hard foever it may be, without

" attempting a refeue; for otherwise, all go-

provocation fluident to acquestions of the

vernment would be unhinged."

The ftating of the case now before us, supposes absolute certainty as to the injury, and excludes all possibility of popular misconception. It is difficult to persuade onefelf, that in fuch a case the relistance of the byo-standers would be unjuftifiable & bas ; sles reference

eathe founded eather in the feet of the voice agreening

Drunkennels, voluntarily contracted, tho it be a temporary frenzy, is no excuse for murder in the law of England; which proceeds in this instance on an idea, that one crime ought not to be privileged by another. I have some-where read, that a beautiful statue having killed a man by its fall, was by a length man, tarwerfal

[·] Socrates carried this idea to a great Extreme, when,

doomed to death by an unjust sentence, he refused to stir from his prison, though the doors were opened to him.

* In the story of Appius and Virginia, one cannot disapprove the insurrection of the Roman people against the Decemvirs.

folemn fentence, founded on a law of Draco, thrown into the les. The Roman law thews great indulgence on this subject, " per grimum "delapfit capitalis pone remittitur."

depends falsty on the versitive of there who 5 7. The crime of taking away the life of another by false testimony, deliberately given, ought not to pass unnoticed. It is in its nature a most malignant species of affassination. contaminating with blood the facred ftream of justice, and fatal to the lives, properties, and honours of the innocent. more almiq , is .

By the laws of Egypt, perjury in general was capital w; for it was faid to involve in itself the two greatest crimes, viz. impiety to the Gods, and violation of faith to man. as described posts of the vest of a second

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deveniry assects transfers, incinsistane, witnessing

At Rome it was also a capital crime, but properly confined to those, " qui falfum testi-" monium dolo dixerint, quo quis publico judicio " rei capitalis damnaretur"."

^{*}v ff. xlix. 16. 6.

w Diodorus Siculus, I. i. c. 6.

² Dig. 1. xlviii. t. 8. § 1.; and under a fimilar rea-foning, magistrates were subjected to capital punishment in cases of bribery, if the bribe were received to put an innocent man to death. Dig. xlviii. 11. 7. 3.

In like manner, it is punished with death in France, and with good reason; for in France the person accused y is not permitted to produce witnesses in his defence, and his doom depends folely on the veracity of those who give testimony on the part of the public. interpretation of the sections.

This circumstance brings credit to the affertion of our ancient writers s, that perjury was capitally punished by the common law. A milder doctrine however hath long prevailed; partly from an apprehension, that such feverity might tend to intimidate witnesses, who would often be induced to stifle their tellimony if it must be given at the peril of their lives; partly in confideration of the nature of our trials, which furnish the accused with a variety of refources; inafmuch as truth and mercy are admitted to combat fallhood and malevolence, and the whole examination is rather in the nature of a discussion between

y L'Esprit des Loix, 1. xxix. c. 11.

2 Mirror, c. 1. § 9. Brit. c. 5. Bracton, 1. iii. c.

4. Contra, Mr. Justice Foster, p. 132.—In some instances, the tongue of the perjured person was cut out.

4. Ascuns sont punies per couper des langues, come
soiloit estre de faux testmoignes." Mirror, c. 4. § de Commentaries, B. iv. 197.

the parties, than of a profecution against an undefended oppressed individual:

False testimony is at present punished capitally in Scotland; but this severity doth not appear to be warranted, either by ancient custom or by statute, but rather to have been assumed upon the indignation of the people against an offence so prejudicial to society b.

§ 8. There is another species of murder of most aggravated malignity, and known in our law by the name of petty treason; because it is a breach of that allegiance which the murderer oweth to the deceased, when the fact is committed s

Petty

b By stat. 26 Geo. II. c. 23. if It is made a felony without benefit of clergy, wilfully to destroy, or cause or procure to be destroyed, any register book of marriage, or any part of such register book, with intent to subject any person to any of the penalties of that statute." An offence certainly more venial than the crime of persury in a capital accusation! But I have already observed, that arguments of analogy, in the framing of penal laws, lead to sanguinary consequences.

c In England, women (from a regard to decency, say our books) are burnt alive for the crimes both of high and petty treason. In Russia, for the murder of their husbands, they suffer a fort of death, less terrible perhaps in idea, but certainly more painful to sense.

"Les femmes, qu'on enterroit toutes vives jusques aux epaules, pour avoir tué leurs maris, vivoient plusieurs jours

Petty treason, in our law, differs widely from other instances of murder, in certain privileges given to the defendant; fuch are, the power of a peremptory challenge of thirty-five jurors, and the requilition of two witnesses to the indictment and at the trial d.

It is certainly true, that the credibility of a witness, or, in other words, the probability of the attested fact, decreases in proportion to the aggravated atrociousness of the charge. Cicero was aware of this principle, and made a fine application of it to the erime of parricide:

" Extett oportet expressa sceleris vestigia, ubis " qua ratione, per quos, quo tempore, malefi-Que nisi multa et manicium fit admissum. " festa sunt, profettò res tam scelesta, tam atron, " tam nefaria credi non potest: pene dicam, re-" spersas manus sanguine paterno judices videant, " oportet; fi tantum facinus; tam immane, tam

dans cette derniere fituation." Voyage en Siberie, de Auteroche.

d Yet it is thought, as petty treason comprehends murder, that, if two witnesses cannot be produced at the trial, the evidence of one may be submitted to the jury, who may thereupon find the desendant guilty of the murder, and acquit him of the treason. Foster, p. 328. Sontra, 2 Hawk. 298. § 144.

" acerbum fint credituri. Magno est enim vis
" humanitutis, multum valet communio sanguit
" nis: reclamitat istiusmodi suspicionibus ipsa
" natura: portentum atque monstrum certissi" mum, esse aliquem bumana specie et sigura, qui
" tantum immanitate bestias vicerit, ut propter
" quos banc suavissimam lucem aspezerit; eos in" dignissime luce privarit"!"

I am forey to add, that particide is not comprehended within the class of petty treation, nor subjected by our laws to any degree of exemplary notice. Reiterated experience hath given a melancholy resutation to Solon's idea, "that it is impossible to commit so una natural a barbarity."

It seems proper, at the conclusion of this chapter, to mention a rule established by Sir Matthew Hale, relative to trials in cases of murder, "I would never (says he) con"vict any person of murder, or manslaugh"ter, unless the fact were proved to be done,
"or at least the body found." He then mentions two extraordinary cases, which shew this rule to be founded both in humanity and

e Orat. pro Sext. Rosc. Amerin. c. 22.

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wisdom; and we find the same maxim in the Roman law: Item illud sciendum est, nist constet aliquem esse occisum, non baberi de samilia questionem s.

§ 9. The proper judgment against deliberate murder, is death; and in the rigid infliction of this judgment both the safety and morality of mankind are greatly interested. It is the voice of nature, confirmed by the law of God, that "Whoso sheddeth man's "blood, by man shall his blood be shed;" and therefore, saith the Mosaical law, "Ye" shall take no satisfaction for the life of a "murderer, which is guilty of death; but he shall surely be put to death, so ye shall not be pollute the land wherein ye are."

f Dig. l. xxix: t. 5. § 44.

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C H A P. XIX to sofor sid out that some Kibrid

Of Duelling.

61. THE law of England hath affigned the punishment of murderers to Duellists and their Seconds ; and in this it is supported by the laws of Religion and Morality. But this crime, though prohibit-

It is very certain, that, in cases of Duelling in cold blood, or when there hath been a sufficient interval for the passions to subside, the Principal and his Second, if homicide should ensue, are in our Law, both guilty of Murder. Some able writers have holden, that the Second of the person killed is equally guilty, in respect of that aid, and countenance, which he gives to the Principals in the execution of their mutual purpole; but it feems (fays Serjeant Hawkins) too severe a construction to make a man by such reasoning the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in the quarrel. Hale, p. 443. Hawk. i. p. 82. Dalt. c. 93.

The reasoning faculties of men vary as much as their saces: it hath been impossible therefore for the law to fix any time in which the paffions shall be supposed to become cool; this must depend on the circumstances of deliberation to be given in evidence; and in many cases it
hath been adjudged, that death in consequence of an appointment and meeting a few hours subsequent to the proocation is murder. See Legg's cafe; Kelyng, 27.

that

ed by the legislature under pain of death and the lafting confequences of an Attainder, is unhappily enjoined by the prejudices of mankind, and the fallible voice of popular estimation; and when shame is the consequence of obedience to law, the fword of Justice loses its terrors. Hence the Duellist kills his friend, whom he lovesh, and the Judge condemns the Duellist, whilst he scarcely knows how in his own heart to disapprove his behaviour.

It is in vain to fay, that this unhappy cultom might be destroyed by punishing the aggrefior, who first gives the affront; for the affront is often indescribable.

The infliction of extreme penalties on the act without regard to its confequences might be more effectual; but is it not to be feared.

There is a degree of hardbip in the case of John Bar-bot. who was executed at the Island of St. Christopher, bot. who was executed at the mand of St. Christopher, A. D. 1753. State Trials, vol. x. p. 182. But I have not found any case of an actual execution in England, in consequence of a duel fairly fought. There were not however any suspicious of a contrary kind in the case of Major Oneby, who would certainly have been executed, if he had not killed himself the night before. See Lord Raymond, p. 1485.-

b Spectator, No 84. Rouffeau, la nouv. Heloife, t. i.

that the propensity of our natures to revenge would substitute the more fatal, and more odious practice of assassination? I shall be answered perhaps, that the sword and the stilleto were equally unknown, both at Rome and at Athens; but it should be remembered, that softness and refinement of manners were also unknown there.

Of little avail is it to object, that true honour depends not on the prejudices of the people, but hath its fource in the heart; that it is more courageous to relift the abfurd tyranny of custom, than to submit to it; that the defence of honour is not placed in occasional appeals to the sword and pistol, but in a life of integrity and virtue; that, when a fencingschool is made the court of justice, there is

Gallantry, as well as Duelling, is of modern invention; and it is very observable, that they have been concomitants in their progress. The intercourse of the sexes hath been the school of manners; and there even seems reason to suspect that our fantastic notions of honour are derived from the influence of semale sensibility. One of the courtiers of William the Third represent this idea very naturally, when, being asked by his friends, why one of his established character for courage and good sense would answer the challenge of a corcomb; he confessed, "that for his due fex, he could safely trust their judgment: but how should he appear at night before the maids of Honour?" See Shaftesbury, Adv. to an Author.

Primates

no law but violence, no argument but murder; that reputation is not cleared by cutting
the throat of the calumniator; that there is
no affinity between the manner of justifying,
and a real justification; that benevolence is
the basis of every virtue; and that it is the
frenzy of fashian which tempts us to decide petty
animosities by the bazard of eternity. All these
affertions may be true; but the most solid
reasoning is received as mere declamation,
when opposed to the impetuosity of passion,
or the fear of shame.

C H A P. XX

Of Suicide.

PRoxima deinde tenent mæsti loca, qui sibi Letbum. Insontes peperere manu, lucemque perosi Projecere animas k.

The best argument of the ancient writers against suicide is to be found in Plato's

k Virgil, Æn. l. vi.

Phædo,

Phædo, in a part of the dialogue between Socrates and Cebes. The philosopher indeed had no occasion to exert his abilities on the opposite side of the question, for he lived in hourly expectation of the executioner. "Illa tanquam cycnea vox divini Hominis 1," had no effect on Cato, who is faid to have given a repeated reading to these speculations on the very night that he destroyed himself. Robeck wrote a voluminous and dispassionate apology for fulcide, and, when he had finished his book put a period to his own existence. Numerous also are the instances, credibly attested, of men, whose conduct in every other respect hath been blameless, who have quitted life, upon the supposed conviction of cool and deliberate reasoning. "When all the ties, say they, of fentiment and affection, which attach the heart to this world, are by a variety of misfortunes diffolved, or forced afunder, the idea is obvious; when existence becomes a burden, death is the refting-place of nature."

Such is the argument of those gloomy sophists, who lose sight of the final object of

The leader had a latted architecture of the

Cicero, de Oratore.

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their

their existence; who forget, that they are not created merely to exist, to suffer, and to die; and are weak enough to place a few years of misery in competition with immortality.

Such men are deaf to the voice of God; it cannot be expected, that they will liften to the comparative infignificance of human edicts. Temporary confiderations have no weight with those, to whom the prospect of eternity is become a subject of indifference.

The confiscation therefore of property, inflicted by many governments on the crime of Suicide, is ineffectual and absurd. It is cruel also and unjust thus to heap sufferings on the head of innocence, by punishing the child for the loss of its parent, or aggravating the distress of the widow, because she hath been deserted by her husband.

The ignominious burial of the felf-murderer is not liable to fuch exceptions; valeat, quantum valere potest. Plutarch tells us, that the virgins of Miletum, being seized with an epidemic perfifted in that practice with great alacrity; till the magnificates ordered the bodies of all, who were found hanging, to be dragged naked by the same rope round all the streets of the city. He adds, that it proved a very effectual remedy m.

Tiberius is said to have given encouragement to criminals, to become their own executioners. "Damnati, publicatis bonis, sepultura probibebantur: corum, qui de se statuebant, bumabantur corporo, manebant testamenta, pretium sessionandi."—Tacit. Annal. l. vi.

m "Le Parlement de Paris condemne les cadavres des homicides, d'eux mémes, à être trainés sur une claie, conduits à la voirie, ensuite pendus par les pieds et leurs biens confisques." Code penal.

tope, the offence of instining was roundled by the interoffectal, coop, an over the an eye are took for a took we wille, if he plente you

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Of other Crimes relative to the Persons of Individuals.

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INJURIES and abuses, which relate to the persons of private subjects, are properly liable to penal laws; for in their example and tendency they are subjective of the public morality, and subversive of the political rules of right.

a serio seriore fur me close

§ 1. By the ancient law of England, and, I believe, by the cotemporary laws of all Europe, the offence of maiming was punished by the rule of retaliation, an eye for an eye a tooth for a tooth ". " Mes, si la pleynte soit " faite de femme qu'avera tollet a bome ses " membres, en tiel case perdra la femme la une " meyn par judgement, come le membre dount " ele avera trespassé." We find the same in-

ftitution

homicide. d'eau memes

n Diodorus Siculus relates a curious case, which happened in consequence of a law made by Charondas to the same effect. L. xii. c. 17.

stitution in the law of the twelve tables, " Si "quis membrum rupit, ni cum eo pacit, talio " efto." The observations made on this subject by one of the disputants in Aulus Gellius are curious and decifive. " Preter enim " ulsciscendi acerbitatem ne procedere quoque " exsecutio justa talionis potest, quod enim per imu prudentiam factum est, retaliari per impru-" dentiam debet. Sed si et prudens ruperit, ne-" quaquam patietur altius se lædi, aut latius, " quod cujusmodi libra atque mensura caveri " possit, non reperio; quin etiam si quid plus " erit, aliterve commissium, res fiet ridiculæ atro-" citatis, ut contraria actio mutue talionis oria-"tur, et adolescat infinita quadam reciprocatio " talionum."

This barbarous mode of punishment, with the pecuniary compensations which attended it, having gradually fallen into disuse, Mayhems became punishable by fines and imprisonment^o; and so continued till the 5th of

it a half a

O Rot. Claus. Anno 13 H. III. m. 9. "Henricus Hall & A. uxor ejus capti sunt et detenti in prisona de Ewilchester. eo quod reclati fuerunt quod ipsi absciderunt wirilia Johannis monachi, quem idem Henricus deprebendit cum prædicia A. nxore ejus."

H: IV. c. g. which made it felony to cut out the tongue; or put out the eyes, of any of the king's subjects, of malice prepense, "The mischief (says Sir Edward Coke ?) before this statute was; that when one had been beaten, wounded, maimed, or robuse bed; the missioers, to the end that the party grieved might not be able to accuse them, did cut out their tongues, or put out their eyes, pretending the same to be no felony."

But the great statute on this subject, at present in force, is the 22d and 23d of Charles II. c. 1. which enacts, "that any person, who, by lying in wait, shall slit the nose, or cut off or disable any limb or member of any subject of his majesty, with intent in so doing to maim or dissigure, shall suffer death without benefit of clergy."

I have specified this particular provision in favour of the nose, for the sake of an observation. The case of Sir John Coventry deserved great indignation; but lawgivers ought not, in consequence of a particular enormity, to neglet the uniform dispensation of justice. The

statute book is not the proper repository of historical facts 4

As to the general purport of the act; the offences described in it are certainly heinous; and the penalty, though in the extreme of severity, is perhaps not disproportionate to the audaciousness of the crime.

§ 2. "The crime of wilfully and malici-"outly shooting at a person" is also made capital, though neither death nor main should ensue.

It is of dangerous consequence to make the attempt to commit a crime, and the actual perpetration of it, equally penal. An affault in any other manner, with intent either to maim or murder, is considered only as a misdemeanor; and it deserves observation, that the wording of this provision, though directed against an enormity of a local and very different nature, comprehends the case of duelling with pistols:

⁹ See the preamble to the 9th Ann. c. 16. relative to the persons of privy counsellors.

r g Geo, I. c. 22.

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Premeditated affaffination is capitally pushifhed by the law of France, though it should rest only in the intent, and not be followed by any actual homicide:

- § 3. The forcible abduction and marriage of women deserves, in all states, a severe animadversion; and it is made a capital selony in our law, if done for lucre; or if the woman have substance in money or lands, or be heir apparent to her ancestors. These hypothetical provisions are liable to exception; but it is unnecessary: for the marriage act hath at least had one good effect, in making this offence extremely difficult to be committed.
- § 4. The forcible taking, and the decoying by false pretences, any man, woman, or child, from their own country, and selling them into another, seems to be one of the greatest crimes below the degree of murder, that can be committed against individuals. By the Jewish, and by the Roman law, such offenders were capitally punishable.

Drdonnance criminelle de 1670, tit. xvi. art. 4. Exod. xxi. 16.—ff. xlviii. 15. 1. and—Cod. ad legem Fabiam de Plagiariis, 1. ix. t. 20. l. 7. and c. 16.

It is remarkable, that in England, where the nature of our situation, and commerce makes this crime easy to be committed; and where the freedom of our constitution makes it peculiarly offensive; it is not mentioned in any statute, but left as a mere misdemeanour at the common lay a country dred or white

semost carrion, to as peicher to lessen the 5 5. Assaults, Woundings, and false Imprisonments, may be prosecuted in our law both as public crimes, and private wrongs. For in these inferior offences against the perfon, it hath been thought reasonable, not only to affign those marks of public disapprobation, which, for the fake of example, are due to all disturbances, and oppressions of a public nature, but also to leave to the party aggrieved that private latisfaction, which is due to him for the mere civil injury.

On the conviction of fuch offences by indictment, the proportion of the punishment depending on the circumstances of the case is necessarily entrusted, under certain restrictions, to the discretion of the court. If therefore the profecution appear reasonable, it is not unufual to recommend to the offender, before judgment, to make a pecuniary fatil-.noifath Commentaries B. & 357.

faction to the party injured; who thereupon releases his right to a civil action, and the punishment by the court is moderated accordingly.

This practice which is founded in humas nity to both parties, is exercised with the utmost caution, so as neither to lessen the efficacy of public example, nor to multiply violent profecutions for the fake of private lucre. It is well observed however, that the exercise of such a power " ought to be confined to judges in the fuperior courts of record, and ought never to be allowed "in local and inferior jurisdictions." Above all, it should never be suffered, where the testimony of the prosecutor himself is ne cellary to convict the defendant; for by fuch means the rules of evidence are entirely fubverted, the profecutor becoming in effect a plaintiff, and being suffered to bear witness for himfelf. depending on the circu

5 6. I should observe, that, by the ninth Anne, c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is made felony without

noifish Commentaries, B. ig. 357-

general rule, to give at first a temporary limited duration to all new laws, which are capitally penal; and particularly to those, which are made on the spur of the occasion.

§ 7. It is with much reluctance that I undertake the mention of certain other crimes relative to the person, which, in their nature and tendency, are very prejudicial to the well-being, morality, and safety of society.

The crimes, to which I allude, are founded in the abuse of that passion, on the due regulation of which depend the existence, and much of the happiness of mankind.

The offence of rape is secret in its kind, and generally confined to the knowledge of the party injured; whose testimony is therefore competent, because frequently the only adducible proof of the fact. The charge however is in most cases supported by the collateral and concurrent testimony of time, place, and circumstances; and the mere

w There is another law still existing relative to felonies against the king's council. 3 H. VII. c. 14

affirmative oath of the woman is rarely thought sufficient to convict. division to all new leases

The well-known words of Sir M. Hale on this subject are very deferving of attention. "It is the excellency of the trial by jury, that they are the triers of the credit of the witnesses, as well as of the truth of the fact : it is one thing, whether a withers be admissible to be heard; another " thing, whether he is to be believed, when " heard."-" It must be remembered, that this is an acculation easy to be made, and " hard to be believed; but barder to be de-"fended by the party accused, be he ever so innocent. And we ought to be the more cautious, because the heinousness of the " offence many times transporteth the judge " and the jury with fo much indignation, " that they are over-halfily carried to the " conviction of the person accused, by the confident testimony of sometimes falle and malicious witnesses." Hom pi et tovo wor collateral and conci

The fame learned writer hath also said. " that this crime ought to be severely and " impartially punished with death;" and allimative

^{*} Hale, vol. i. p. 634.

we may allow it to be one of those unhappy instances, in which it is necessary to sacrifice the life of a fellow-creature to the security of good citizens, and the peace of society. But it must also be admitted, that it is a crime peculiarly liable to vary in the degree of its atrociousness, according to the circumstances of the case, and therefore peculiarly open to the divine prerogative of pardon.

This crime was a felony at the common law, and had a punishment (saith Sir E. Coke) y " under such a condition, as no other felony had the like."

The offender was adjudged "amittere oculos,"
quibus Virginem concupivit; amittere etiam
"testiculos, qui calorem stupri induxerunt." As
good reasons might be given for cutting off
the legs and arms of the offender, as for
putting out his eyes. The idea of castration
is more obvious, but liable to two objections;

Y 2 Inft. 180.—See the Myrror, c. 4. § de Homicide. And by the laws of Alfred, "Servus si servulam stuprarit, Virga virilis ei præciditor."

z" Item sequitur gravis pœna corporalis, sed sine amisfione vitæ, vel membrorum, si raptus sit de concubina legitima, vel alia quæstum faciente sine delectu personarum; bas quidem oves debet rex tueri pro pace sua; et licet meretrix suit antea, tum temporis non suit, cum nequitiæ

ejus reclamando consentire noluit." Bracton, 1. ii.

it is pernicious to fociety from the example of barbarity, and inconfiftent with that decency, which the law always ought to preferve.

The latter consideration should never be neglected. It was an instance of the wisdom of the Emperor Theodosius, that he abolished the infamous punishment of women taken in adultery, then used at Rome; by which they were profittuted in the public streets to all comers, a Bell ringing during the execution of the sentence.

In the ancient law of England, exclusive of the punishment inflicted on the ravisher, his horse, greyhound, and hawk, were also subjected to great corporal infamy; " Equus " ejus ad dedecus suum dedecorabitur, cauda, " quam propius natibus possit, abscissa; eodem modo canis leporarius dedecorabitur, et ac- cipiter ejus perdet beccum, ungues, et cau- dam:" but the woman, that was ravished, might prevent all the penalties, if, before judgment, she demanded the criminal for her husband. The Roman law was in the

Puffendorf, viii. 3. 27. Socrat. Hist. Eccl. l. y. c. 18.

Staunford, 22. B.

fame fpirit: " Ropta raptoris, out mortem, aut indotates nupries optet:" upon which there arose what was thought a doubtful cafe, " Una nocte quidam duas rapuit, altera mortem optat, altera muptias." In the judgment of common fense the decision is evident. male feren.

In the conftruction of this crime the Roman law made no diffinction between feduction and force; " Sive volentibus five nolentibus tale facinus fit perpetratum." In mo-. arrânio ment most ain la . dem

The ancient Laws of England treated every species of Incontinence with great leverity.—" Edmondus rex adulterium affici justit instar homicidii." Leg. Edm. c. 4." Canutus rex hominem adulterum in exilium relegari justit, seeminæ nasum et aures præcidi." Leg. Canuti, c. 6, & 50. "Vidua si se nan legitime commiscebat xxs. emendabat. puella vero xs. Domesday, Tit. Cestre.—" It is (says Fleta, l. ii. c. 5.) the office of the Marshal, in time of peace, to exact from every common woman found about the court four pence on her first apprehension, and to forbid ber the court. On the second, he is to oblige her by dures to abjure the court. "Tertio, considerabitur quod amputetur illi trefforia et quod tondeatur; quarto, amputetur illi superlabium."—Sir Edward Coke cites a record, in which Edward the Third commands the Mayor of London to remove all fuch women from the neighboarhood of the Carmelite brethren in Fleet-street. And "under Hen. VIII. those infamous women (he adds) were not allowed chriftian burial when dead, nor the rites of the church whilft they lived." A. D. 1650, it was enqualified

dern nations, where the intercourse of the sexes is more promissions, this severity would be very extensive in its consequences. The English law hath made force necessary to the crime; and it was made felony without benefit of clergy in a female reign.

There was a degree of good sense in the punishment inslicted by the Athenian laws on the ravishers of unmarried women; "Raptor virginis mille drachmis (about 321. 68.) multator; et virginem, quam vitiavit, ducito." It

qualified for the rational and deliberate work of legislation) that "if any man shall from and after the four and "twentieth day of June following have the carnal know-"ledge of the body of any virgin, unmarried woman, or widow, every such man so offending and confessing the same, or being thereof convicted, as aforesaid, shall for every such offence be committed to the common jail, without bail or mainprize, there to continue for the space of three months: and every such offence is hereby adjudged selony, and the person or persons so offending shall suffer death, as in case of felony without benefit of clergy." Scobell's Acts and Ordinances, p. 122.

By the same act, adultery, in the first instance, is made felony without benefit of clergy.

The law of Howel Dda on this subject was written in a milder spirit. "Si quis concubuerit cum ancillà invito ejus "domino, dabit domino ejus x11 denarios pro qualibet vice, " et sum illa amplius non concumbet." L. 1. C. 1.

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appears however from a passage in Terence, that the latter part of the law was confined to Athenian citizens.

- D. Ab Stulte ! tu de efaltria me somnias
 - Agere : Hic peccatum in virginem est civem. M. Scio.
- D. Ebo ! Scis ? et patere? M. Quidni patiar ? D. Dic mibi, Non clamas ? non insanis ? M. Non, malim quidem.
- D. Puer natus eft. M. Dt bene vertant. D. Virgo nibil babet.
 M. Audivi. D. Et ducenda indotata eft. M. Scilicet.
- D. Quid igitur facies? M. Domi erit. D. Prob Divûm fidem! Metetrix et materfamilias unâ in domo d.
- § 8. The above-mentioned caution of Sir Matthew Hale is peculiarly applicable to the proof of certain other crimes of a very detestable nature; the mere mention of which is disgraceful to the human species.

The facts to which I allude are at present felonious, and without benefit of clergy, by 5 Eliz. c. 170; in the construction of which statute, agentes et consentientes pari pand plectantur; and this agrees with the law of Mo-

commonly, below unwilling to liek occasion

d Ter. Adelph. IV. vii. 8. & 28.

Si quid ego erga Te imprudens peccavi, aut natam tuam, Ut mihi ignoscas, eamque uxorem mihi des, ut leges jubent. Plaut. Aulul. IV. x. 62.

This act revived the 25 H. VIII. c. 6.

ses, " Qui dormierit cum masculo coitu samineo, " uterque operatus est nesas, et: morte morie a tur!"

It hath been fuggested by some ingenious writers, that severe penalties affixed to the conviction of crimes, the discovery and proof of which may be easily evaded, are more likely to add suel to the guilty stame, than to extinguish it s.

The idea is plaulible in theory, but doth not appear to be well supported by experience.

proof of census other crime

It is a maxim (lays Busbequius) among the Turks, seldom to make enquiries after secret criminals, being unwilling to seek occasion for scandal; the severity of their laws is directed against open breaches of the peace of society. To this may be added, that, in the histories of the Turks, we read accounts of Turkish seraglios without a woman within the walls.

fLev. xx. 13.

E "Veteres pænarum satis adversum impudicas in ipså prefessione slagitii credebant." Tacit. Annal. l. iii. c. 85.

The profligacy of the Athenians on this fubject is well known; and the partial restrictions established by Solon certainly had no tendency to a forcible extirpation of it.

"Servus ingenuum puerum, ne amato, neve af
"fectator; qui fecus fâxii, publice quinquaginta

"plagarum ictus illi infliguntor." It was an obvious inference to the people, that the pursuit prohibited to slaves was proper only for citizens. Again, "Siquis liberum atque in
"genuum puerum produxerit, dica ei scribitor, "convictus morte multator." The seduction of any other rank was not in any degree penal.

Corn. Nepos fays of Alcibiades, " quod in" cunte adolescentia amatus est a multis, more
" Gracorum:" and that " Laudi in Gracia
" ducieur adolescentulis, quamplurimos babero
" amatores."

The edict of one of the latter Emperors on this subject is delivered with great energy of expression: "Quid desideratur ubi sexus perdit "locum? ubi amor quæritur nec invenitur?" ubi scelus est id, quod son prosicit scire? ju-

Aniego A See Petit, Lez Att.

" bemus insurgere leges, armari jura gladio ul" tore, ut exquisitis pænis subdantur infames,
" qui sunt, vel qui futuri sunt, rei "

§ 9. I ought to have observed, that the English law describes this offence as commissible "with Man or Beast;" under the latter part of the expression many persons have suffered death.

The unavoidable and general deteftation of mankind will always be a ftrong barrier

i Cod. ix. 1. 9. 31. See also Now exli. t. 24. "de his "qui luxuriantur contra naturam." Apud Gothos castra"bantur," Leg. 8. Westg. l. iii. 25. This crime is called by the Myrror "une peche mortelle encontre le roye le ciel, que cry vengeance, et que pluis est horrible, que porgiser mere," p. 252. There is a very indelicate profusion of learning on this subject in M. J. Fortescue Aland's report of the case of Wiseman, who was tried and convicted de boc crimine cum puellà. A very learned person is there said to have thought the peculiar circumstance of the case a great aggravation of the crime.; "For it seems (said his "Lordship) a more direct affront to the author of na"ture, and a more insolent expression of contempt to his "wisdom, condemning the provision made by him, and desying both it and him." Fortescue's Rep. p. 93.

"Nefando non naturalis impudicitiæ crimine qui damnatur, in rogum ardentem impositus slammis absumitor,"

Jura Danica, l. vi. c. 13.

"Messis Bruneau le noir, et Jean Diot convaincus de ce crime ont été brulés en place de Gréve le Lundi, 6 Juli-

oth god skill and 4

let. 1750." Code penal. 238.

Daniel &

against

against so horrid a crime; but it may be a question, whether the public prosecution thereof be sounded in wisdom. Some have thought it unsafe, and likely rather to sollicit the attention, than to deter from the crime.

"Sapienter secisse dicitur Solon cum de eo nibil sur samprobibere, quam admonere videatur":—

"tam probibere, quam admonere videatur":—

"præterea" videmus ea sæpe committi, quæ sur sepe vindicantur. Summå prudentia altissimi viri et rerum naturæ peritissimi maluerunt, velut incredibile et ultra audaciam positum, ses selut incredibile et ultra audaciam positum, dere posse siere. Facinus aliquando pæna mondere posse siere. Facinus aliquando pæna mondere quanto plures mali sunt"

of wilful poitoning to be punished by boiling to death, JIXXve At AlcHael by the pre-

amble, that John Roofe, a cook, had been lately tragger of ovitales, teming of or ovitales, teming of into a

s I. I INDER this head, the offence of wilfully burning the house of another is confidered as of the blackest ma-

Sepeca de Clement. 1. 1. c. 23.

And & .nesy dignity;

lignity; being fatal to the fecurity of the innocent occupier, dangerous to the lives and possessions of persons even unknown, unlimited in its consequences, and merely malicious in its motive.

By the ancient laws of England, it was a felony, and one of those capital offences for which no ransom was allowed; and Briton tells us, that persons convicted thereof were burnt to death; probably under the idea of retaliation, or at least to make the punishment savour in some degree of the crime. Such whimsical connections have frequently influenced the minds of Lawgivers. It might, for instance, be difficult to conceive, why the 22 H. VIII. c. 9, o should direct the crime of wilful possoning to be punished by boiling to death, were we not informed by the preamble, that John Roose, a cook, had been lately convicted of throwing posson into a

n Hint que ils foient punies per mesme le chose, dont ils pecherent." Brit. fol. 16.

The same statute forced the same of high-freeson upon the crime of poisoning. And in 33 H. VIII. Margaret Davy, a young woman, was attainted thereof for poisoning her mistress. And some others were also boiled to death in Smithfield, on the 17th day of March in the same year. 3 Inst.

large pot of broth, prepared for the bishop of Rochester's family, and for the poor of the parish; and the faid John Roofe was, by a retrospective clause of the same statute, ordered to be boiled, perhaps in his own kettie R. But I return to the description of Atlon. which is given by the Myeror, in the following extensive terms 9: " Ardours sont, que ar-" dent citie, ville, maison bome, maison beste, " ou nutres chatela, de leur felony, en temps, " de peuce, pur haine ou vengeance." In subfequent ages it underwent various alterations, both in its definition and punishment, and at Hength by other Geoid Lack 22, made perpetual by gro Geo, Illocod42, it was, with many other offences, made felony without benefit of clergy, to " fet fire to any thoule, barn, or out-hould, or to any hovel, cock, mow, or flack of corn, flrew, hay, are made guilty of felony withoubdoweld at

I have given a literal transcript of this claufe, as a ftrong inflance of the vague, unfeeling, undistinguishing careleffness with which penal laws are composed, even in the most po-

JE S

p Observations on the Antient Statutes, p. 406. Myrtot, C. 1.5 8. lifhed land burglary, occasio it is no felonious latent.

lished times. The penalty should in all cases, if possible, bear some proportion to the malice and mischief of the offence; but every idea of proportion is obliterated, when the same degree of guilt and punishment is allegated to the incendiary of a populous town, and to the destroyer of a small heap of dried grass.

The same severity is shewn, by the above-mentioned act, to all persons "who shall cut down, or otherwise destroy, any trees planted in any avenue, or growing in a garden, or chard, or plantation, for ornament, shelter, or profit;" though, by a former act, it continues only a clergyable felony, to set on fire any wood, underwood, or coppice. And by the 10th Geo. II. c. 23, persons maliciously setting on fire anymine, pit, or delf of coal, are made guilty of selony without benefit of clergy:

r Co. 63. And therefore an indistment for breaking into the house of A. B. with intent adverber and am influm A. B. is no burglary, because it is no felonious intent.

But

of England to commit burglary, and is, in the degree of his offence, the next object of inquiry. Blad an ablance that we have the same of the same of

Exclusive then of the permission given by our law to the alarmed inhabitant to kill his affailant, the sword of justice is also drawn against such affailant, and punisheth him with death, in case he should, by superior strength, or otherwise, escape alive from the execution of his purpose; and not only the Principal is made guilty of felony, without benefit of elergy, but also the Accessary before the fact.

The atrociousness of this crime consists chiefly in the terrors brought upon those who are found asleep and defenceless; and are deprived of that security in which they have a natural considence.

For this reason the indictment must charge the house to have been a mansion-house at

But the opening of a door by a fervant in the night time to come into his mafter's chamber, with intent to kill him, was by all the judges agreed to be burglary. Kel. p. 67.

It was in like manner, one of the laws of the twelve tables, "Si noctu furtum fit, jure cafus eft."

the time of the burglary; yet it may be doubted, whether our law hath not in some degree departed from this idea, in holding that "where the owner quitteth his house animo "revertendi, it may still be considered as his "mansion-house, though no person be left in it, nor found there at the time of the "fact committed."

There must be both an actual breaking and an lentry to compleat the crime. And here also it should be observed, that Sir M. Hale seems to speak with an inadvertence, and latitude, very unusual to his temper in cases capital, when he says, that if a hole be made in the house one night, with intent to commit a selony, and the same breakers enter the next night through the same, they are burglars: 60 for the breaking, and entering, were both notsanter, though not the same night; and it shall be supposed, that they brake and entered on the night when they entered,

t Comment. B. iv. p. 225, and Foster, 77. who specifies the long vacations of lawyers, and the summers of citizens, as instances of such quitting animo revertendi. "The breaking in such case (saith Sir Matthew Hale) is burglary, and the indictment shall suppose it domus mansionalis." Hale, P. C. vol. 1. p. 556.

" for the breaking makes not the burglary, will permit wite all feverally, witness the line the confiruction of law, amount to an actual

I am perhaps miftaken in thinking there is a degree of feverity in this opinion; for it certainly hath not been the inclination either of Sir M. Hale, or of shole who have followed him , to Suppose dany thing that ought por to be supposed against a person under a capital acculations "Petit should feem; that in the interval between the breaking and the entry, it is the dury of the occupier rather to repair the damage, than to leave it a temptation to further stracks! and conflittently with this it hath been holden, that if a perion leaves his doors and windows open, it is his own folly and negligence; and, if a man enters therein, it is no burglary ban million to the

Opening the calement, unlatching the door, picking the lock, gaining admission by falle pretences, going down the chimney vi

chidw who med him "It appeared in evidence, that the

w In the trial of a prisoner at Cambridge, Sir M. Hale was doubtful whether this was burglary, and so were some others; but upon examination it appeared, that in his creeping down, some of the bricks of the chimney were loofened, and fell down into the room, which (fays he) put it

which is as much closed as the nature of things will permit, are all feverally. Acts, which, in construction of law, amount to an actual an pelaps miffeken in thinking mikend

a degree of feverity in this opinion; for it The entry may be previous to the breaking for by Stat. 12 Ann. c. 7. if a perion enters into, or is within the dwelling-house of another without breaking tin, either by day or by night, with intent to commit felony, and shall in the night break out of the same. this is declared to be a burglary.

sepair the demage, then to leave it a tempta-It is holden, that, to put a hand or a hook in at the window, to draw out goods, is a burglarious entry ... And this is another insouth of v and negligence; and, if a man en-

out of question, and direction was given to find it burglary.

Vol. i. p. 542.

It would not be easy for any man, whose understanding hath not the advantage of a professional education, to conceive how the nature of the crime should be varied by so trivial an accident. Such deviations of sound sense into south statements are southern the consistence of south sense southern the sou

forhistry are 100 often the confequences of legal reasoning.

* See the case of Gibbons, as reported by one of the judges who tried him. "It appeared in evidence, that the prisoner in the night-time cut a hole in the window shutters of the profecutor's shops which was no part of his dwelling-house; and putting his hand through the hole, took out watches, and other things, which hung in the shop within his reach; but no entry was proved, otherwise nadfreening cown, tome of the bricks of the chinney were loolened, and fell down into the room, which ("ayshe) put at

france in which the confiruction forms to have exceeded the true idea of the offence, was a "

I have expressed the more anxiety on this subject of burglary, because the selfish intensibilities of mankind may be too apt to excite an incantious indignation against the persons accused thereof, and because the lists of capital executions shew it in fact to be peculiarly fatal to Englishmen.

If the existence of those who are convicted of this offence be really dangerous to the lafety of society, it is certainly both justifiable and proper to punish them with death; but this criterion of severity ought most strictly to be regarded.

It deserves observation, that the punishment of breaking on the wheel, as practised in France, was first introduced and applied against this offence by Francis the First. A. D. 1534, in the following words: "Tous cause "qui auront été duement atteints et convaincus

than by putting his hand through the hole. This was holden to be burglary, and the prisoner was convicted." Foster, p. 108.

" par

Fills ?

104 W

" feront punis en la muniore que s'en suit en est conservant en la muniore que s'en suit en est en se conservant en la muniore que s'en suit en est en est en les reins, pandes et tuisses, et mus sur une rolle un baute, plantee et élevée, le visuge tontre le ciel, en du ils demetrement orvants pour y paire penises le la la demetre en se morte, paqu'à ce qu'il en soit ordonné par sufficé apar de donnér en soit ordonné par sufficé apar de donnér crainte, terreur, et example, à tous autres de la méchoir ni tomber en tels inconveniens."

This punishment is applied by the lame edict: to highway myobbers want the tame to him of words is containty bled at this day.

Though burglary may be committed without any abduction of the property of others, either intended or completed, yet in general, to audacious a breach of the peace of foclety is commenced couff lacer, and confequently attended by theft, in which case it is a mare aggravated species of largeny.

than by outting his hand through the hole. This was hotden to be burglary, trior of theneq oloo yeonyteed." Folker, p. 103.

OT

S 3. Lar-

ving 3. Larceny, when confidered as a goderical term, is the felonious taking and carrying away of the perfonal goods of another anian felfion was gained without the coulent of the

The felonious intent cannot be prefumed from the wrongful possession; it must result from the evidence given, that the taking was committed animo furandi vin I would hever "(fuys Sir Mr) Hale) sonvict any puntos for "the dealing the goods being family harrily " because he would not give an account his the came by them, winters there were the As proof made that a falling was committed " of these goods!" Twints Jemper eft errure en parte Mistricordie olgunio es parte fuficie. This worthy judge, though whitemare in cales of witchcraft, was the every threated beculturly anxious, that perions really innocent might not be entangled ander those pierimip tions, which many times carry great probais By at Hen. VIII. c. 7. See also a sling la trilid.

If

ect is fill in existence, and inflicts an arraint of felony on

di, invite ejus domino cujus res illa fuerit." Braccon Lini.
150. Pleta, 1. 1, 46. Hale Histo P. C. in 250.

Por it is no felony by our law, if A find the pure of B in the highway, and take it and carry it away, and this with all the circumstances that may prove it to be done, animo furandi, as denying it, or fecreting it, &c. But by the Swedish law it is felouy?

If the felonious intent should be clearly proved, still it will not amount to a felonious taking, unless it thould appear, that the posfession was gained without the consent of the The selections intent cannot be prasuvoi

from the wrongful possession, it must refult esult may, at first view, appear, that this diftinction, bath many exceptions in the law of England; as in the cases of servants embezzling their mafters goods to the value of forty thillings of persons having the custody of the king's ammunition or habiliments of war, and embezzling the fame for of a gueft robbing his inn or tavern of so piece of plate fet before him i of a lodger running away with furniture from his lodgings, who are all feverally punituable, as felons guilty of larceny. But it should be observed, that in all fuch inflances, the taking is actual; the tions, which many times carry great proba-

b By 21 Hen. VIII. c. 7. See also 33 H. VI. c. Which act is still in existence, and inslicts an attaint of felony on

the fervant's default of appearance to answer to the mal-ter's executors in a civil fuit.

c 31 Eliz. c. 4. & 22 C. II. c. 5. which takes away the besent of clergy from this offence, to far as it relates to naval flores. See also 1 Gep. I. c. 25.

d Hale. H. P. C. vol. ii. p. 506. Hawk, P. C.

e Stat. 3 & 4 W. & M. C. 9. 12 et if wel Chand out

offender having only the liberty of use, and nor the polletion; by delivery. I then in general

Very different is the offence of A who rides away with a horte, which is lent to him by B; or of the Carrier, who lecretes, and converts to his own tile, the pack, or parcel, which is delivered to film. The property bere is severed from the possessions; and such persons are guilty only of the violation of a civil truff, and are punishable accordingly. Yet if hath been faid by Sir E. Coke, and adopted by other writers, that if the carrier openeth the bale of goods, and taketh only a part h thereof, it is so manifest an evidence of the animus furandi, that it amounts to larof the feveral species of property, the

come under the idea of the perfouel goods of

lain e es gansler agalitive

f I venture to use this expression, though the very learned Observer on the Ancient Statutes hath expressed a doubt, whether any reasonable line of distinction can be drawn between the sales here placed in opposition.

Obs. p. 371.

The possession recovery of the carrier, in the goods delivered to him, is such, that he may melhasin either an action of trespals or indictment, as for his own goods, according to the circumstances of the case, against any one that taketh them from him. See Kel. 39.

1 3 Inst. 107. Comment. B. iv. 230.

It must be consessed, that, by the civil law, such breaches of trust, amounted in general to larceny, "Si creditor pignore, sive is, apud quam est deposite, ea re utator; sive is, qui rem utendam accepit, in alium usum eam transferat, quam cujus gratia ei data est; furtum commissse videtus."

There must be an abduction or carrying away; but a bare removal of things taken, shough immediately interrupted by detection or apprehension, satisfieth this part of the definition.

It would lead me into an endless intricacy of discussion, were I to enter upon the detail of the several species of property, which come under the idea of the personal goods of another bounds, and another to the detail of the personal goods of another bounds, and another to be another to the detail of the personal of the personal details and the several of the personal of the per

No larceny could be committed at the common law on chattels real, or things adhering to the freehold. This narrowness was founded rather on the prejudices of legal language, than on the conclusions of reason; and hath been remedied by various statutes. The stealing of writings, relating to a real estate,

estate, still continues only a trespass by but in general, the law on this point bath run into the opposite extreme of feverity and many things are become objects of larceny, which ought never to have been confidered in that fer girrere, proper for food, authemasibeta

as to be reclaimed. It may be a fufficient proof of this last afferfion, that the flealing by night of any trees, or of any roots, thrubs, or plants, to the value of five fallings, laby & Geo. In. c. 36. made felony in the principals, aiders, and abettors, and in the purchasers thereof, knowing the fame to be stolen. There is another milder act, c. 18, relative to the stealing of timber trees, thrubs, &c. by day or by night. It is undoubtedly true, that mild punifoments are the best safeguards against such delinquencies.

Bonds, Bills, notes, &c. are by that 2 Geo. It. c. 25. and very properly confidered, with respect to larceny, of the same value as the money, which they represent.

the fore

T See the case of the king against Webster, Trin. 13 G. H. in B. R. Stra. 1133. It was found by the special verdict, that the defendant had stolen a commission to fettle houndaries, and also another parchment relative thereto, each value one penny. The question was fully argued; and it was determined, not to be a felony.

I Ithave heretofore occasionally cired many of our very harfn provisions relative to game; Larceny may also be committed of allqualda able and domettic animals as horfest, roxen; sheep at, hens, geefe, see, and of all animals feræ naturæ, proper for food, and known fo as to be reclaimed.

It may be a fufficient proof of this last affer-Le is enacted by flatute 37 Ed. III. c. 19 "That if any person finders any hawk, that is loft of his Lords, he shall forthwith bring it to the Sheriff of the county, who shall make proclamation and that if any fleal any hawk, and the fame carry away; it shall be done of him as of a thief, that ftealeth a horse or other thing." The concealing and carrying away is adjudged a feeling by this act, " In respect, saith Sir E Coke ", of the " noble and generous nature and courage of " faultons; ferving ob vita folatium of princes, and of nobler and generous perfons " to make them fitter for great employments."

In judgment of law, a man may, under certain circumstances, be faid to have taken the goods of another; though he himlelf hath

the

verdiff, that the dell Stat. 1. Edw. VI. c. 12. 2 and 3 Edw. VI. c. 33-

¹ Stat. 14 Geo. H. c. 6. 15 Geo. H. c. 34,00 310 m 3 Inft. p. 109.

the general property in the goods taken. A delivereth goods to B to keep for him, and then stealeth them, with intent to charge B. with the value of them. Or, A having delivered money to his servant to carry to some distant place, disguiseth himself, and robbeth the servant on the road, with intent to charge the hundred. Both these cases are largeny in Al: "For the money and goods are taken from those, who have a special temporary property in them, with a wicked and fraudulent intention."

tion of darceny, and am next to confider its different species or degrees of enormity.

of burglarious larceny I have already spoken; the next in degree is Robbery, or the open and violent taking of money or goods from the person of another, by force, or intimidation."

If the thief, finding the thing taken of little value, should return it; or if, after taking it, he should drop it through fear or by accident; still it is a robbery: for the

a Foster, p. 124. Hale, vol. r. p. 513.

outrage offered to the rights of fociety doth not wary in its nature, because inespectual in its confequences.

A taking of the goods of another in his presence only, as in the case of taking parcels out of a waggon, amounts to taking from the person, if done by putting him in sear; and "the law, in edium spaliatoris, will presume fear, where there appeareth to be a "fufficient ground of for it;" requiring only, that the fact be attended with those circumstances of violence or terror, which in common experience are likely to induce a man to part with his property, for the safety of his person.

The benefit of clergy is taken from this species of larceny, wheresoever committed, by stat. 3 & 4 W. & M. c. 9; and the value of the thing taken is immaterial. An attempt to commit this offence is, by stat. 7 Geo. II. c. 21, made a felony, transportable for seven years.

This crime certainly is a very audacious violation of the focial compact, and proper to

thating

Fofter, policy at a mile !

little value, thould return

be feverely punished by the laws of society; yet is may be doubted, whether it be of that heinous kind, which requires the ultimum supplicium; particularly when not aggravated by personal injuries to the party robbed. We have many instances of a peculiar generolity in the nature of English robbers; but it deserves consideration, whether it be not dangerous to society, to leave so little distinction between the punishment of simple robbery, and robbery perpetrated with murder?

\$ 5. It cannot be too strongly inculcated, that capital punishments, when unnecessary, are inhuman, and immoral; an observation very applicable to the punishment, inflicted by our laws on the crimes, which I am next to mention.

Private larceny from the person, of any money or goods above the value of twelvepence is deprived of the benefit of clergy by

tren fin following managed

p " A la Chine les voleurs cruels font coupés en morceaux, les autres non: cette différence fait que l'on y vole, mais que l'on n'y affaffine pas.

mais que l'on n'y affaffine pas.

En Moscovie, ou la peine des voleurs et celle des affaffins sont les mêmes, on effaffine toujours; les morts, y dit on, ne racontent rien." L'Espr. des Loiz, avi. c. 6.

the 8th Eliz. c. 4. 4 " that the fraternity or brotherhood of curpurfes and pick-" pockets (as they are described in the preamble) " may not continue to live idle by " the fecret spoil of good and true subjects." A public and well-regulated work-house would have been a more proper remedy for this offence. "The punishment of robbery, " not accompanied by violence, should (fays. Beccaria) "be pecuniary; he who endea-" vours to enrich himself by the property " of others, should be deprived of part of " his own. But this crime, alas! is com-"monly the effect of milery and defpair : the crime of that unhappy part of man-" kind, to whom the right of exclusive " property hath left but bare existence." It would be abfurd then to extort pecuniary fatisfaction from those, who are already ftruggling in the extremity of want; but there would be no absurdity in the infliction of temporary imprisonments, with compulsion to labour; a mode of punishment, which, by inducing a habit of industry, and by

The reason assigned by L. C. J. Kelyng for the framing of this statute is not satisfactory. See Kel p. 70.

the effects of that habit, would be equally beneficial to the criminal and the public, with 14 above the value of twelve pence from a

dogo Larceny from the house, whether privily committed without violence, or openly in the day time, and therefore in neither cale amounting to burglary, is nevertheless by the laws of England made capitally penal in almost every instance, and this by a multiplicity of statutes, fo complicated in their limitations, and to intricate in their diftinctions, that it would be painful on many accounts to attempt the detail of them. It is a melancholy truth, but it may! without exaggeration be afferted, that rexclusive of those who are obliged by their profession to be conversant in the niceties of the law, there are not ten subjects in Engaland, who have any clear perception of the feveral fanguinary restrictions, to which on this point they are made liable. he becomes

-ugo Asmodern writer, whole Book is peculiatly a calculated for the general benefit of mankind, hath, by a diligent collation of the statutes to which I allude, reduced this chaos to fome degree of order. I shall transcribe from his account, that the benefit of clergy is now denied upon the following supposed aggravathe contract of the vertical tent

to hor. Their deenties have, with great plan-

the effects of that habit, would be equally tions of larceny is viz. " in all larcenies " above the value of twelve-pence from a Micharch on from a dwelling-house, or booth, Many person being therein in all larcenies, to the value of five hillings, committed off by breaking the dwelling-houle, athough mo person be therein in all larcenies to the while of forty hillings from a dwelling-"house, or its out-boules, without breaking tithin; and whether any person be therein or of no and in all larcenies to the value of five the fhillings from any thop, ware house coachby honle, or stable x whether the fame be vibbroken open or not, and whether any perasis fon be therein or no. od In all thefe cafes, whether happening by day or by night, the benefit of clergy is taken away from the feweral fangulary refinitions, andreffic and

§ 7. These severities have, with great plaulibility, been ascribed, to the increasing Appublence of the kingdom, and indeed these seems or sometall add to nountless months and alread

this point they are made hable.

anoit

fufficient

Stat. 23 Hen. VIII. c. 1. 25 Hen. VIII. c. 3.

But VII e. 12. 15 and 6 Edw. Vi. c. 19. 39 filiz.

C. 15. 3 and 4 W. and M. c. 9. 10 and 11 W. III. c. 23.

12 Ann. c. 7.

Observations on the Ancient Statutes, p. 375.

fufficient reason to believe, that fanguinary laws are the probable confequence of national prosperity. Sensibility sleeps in the lap of hand and the legislator is contented to fecure his own felfish enjoyments, by subjecting his fellow citizens do the mileries of a dungrong and the horrors of an ignominious death. Still however, he feels a tacit difap probation of the laws, which he hath enacted and even, when injured helicates to bring the offender to multice. He knows, that the punishment is disproportionate to the offence; or at least, if humanity be obliterated by interest, he foresees that the punishment canof hociety against the accuser. The delin-Sution he repeats the crime, under the expectation of repeated mercy; he becomes gradually familiar with dishonesty; and at length falls a victim to that prepofterous feverity of the law, which hath to long been the subject of his mockery. It is a property neither regular, nor expeditious in their execution; consequently, that they flatter the hope of impunity, and, equally injurious to the fociety and to the criminal, tend to the bettevolence

fatal multiplication both of crimes and of pulling of the land of pulling of the land of t

Exclusive of the several larcenies which I have already described, and their respective penalties; it is, and hath been from the year 1109, the law of England, that in general all persons guilty of larceny above the value of twelve-pence shall be hanged.

Animalveria autem in quantum as perstatem, ex rerum temporarumque vicifitudine, lex antiqua abripitur.

Quod enim olim XII vanit denariis, bodie sape XX solid. 1110 XL, vel pluris est, nec vita bominis interea chartor, sed abjection. This well-grounded complaint was published by Sir Henry Spelman, above a century ago; during that long interval the grievance hath been gradually increasing, and still remains unic-dressed.

But the error lies deeper. Money, which in its nature is of fluctuating value, is in no cafe proper to be made the flandard-measure of criminality. When the punishment of the finder depends on the value of the thing stolen, the adjudication of the law is vague and uncertain. Mercy also is admitted under the shield of interpretation; the impulses of benevolence

benevolence are opposed to the obligations of religion; and jurors are taught to trifle with their oaths, and to call such trifling " a kind of pious perjury."

In fact, upon trials of larcenies to limited, it is commonly found to be the chief anxiety both of judges and of jurors, to reduce the crime below its real predicament, by reducing the conviction below the value affixed by law. Such an anxiety is the natural confequence of laws, which, by an abfurd diffinction, make a trivial difference between two fums the criterion of a capital crime; and enact, that a penny more or less shall be equivalent to the life of a man.

In ancient times, larceny was punished in fome cases with the loss of a thumb in others with the pillory, and the loss of an ear, in others with demembration, by cutting off the hand or foot w, but this only after repeated acts. At length, by our Saxon laws,

U 3

w Corone, 434. 10 H. III. Briton, xxiv. 6.
w Laws of K. Ina, Lambard, I. xviii. St paganus fapius
furel infimulatus fit, ei manus et pes praeciditor. This mode
of punishment was also much used in the reign of Hen. II.
Bened. Abb. p. 132. Hoveden, p. 549.

pence, punished with death, but the penalty was redecriable by pecuniary composition, which was called capitis affinatio. By the laws of Ethelbert this composition was a threefold restoration, besides a fine to the king; and, if the thing were stolen from the king, the restoration was since-fold; but by the 9th of Hen. I it was enacted, "ur si quis in furto vel latrocinio deprebensus fulfer, suspendere-tur; Sublata Weregildorum, id est pecuniaria redemptionis, lege."

§ 8. Forgery, which is defined to be the fraudulent making, or alteration, of a writing, with intent to prejudice the right of another, is also a crime against property.

It appears to have been a species of the crimen falf among the Romans; but it is rarely mentioned by them, or in the laws of other ancient nations; and the reason is obvious

The increase of modern riches, the invention of paper, the many complex securities, and representations of property, the institu-

peated acts. At length, by our Saxon laws,

Leg. Anglo-fax. p. 304.

The state of the state of

In second Can

tion of national funds, and rules of written evidence, have all contributed to render forgery a confideration of great extent and importance. The offender, by 5 Eliz. c. 14, is punified with forfeiture to the party aggreeved of double cofts and damages; with standing in the pillory, and having both his ears cut off. and his nostrils flit, and feared; with forfeiture to the crown of the profits of his lands, and with perpetual imprisonment. I have cited this flature, which extends only to certain forgeries therein described, merely as proper to be repealed. At present, " the imitation of stamps. in order to defraud the Stamp-Office; the antedating of a deed of conveyance in order to over-reach a former deed an alteration in the name and description of the premisses conveyed, or in the fum of money fecured by bond or other deed, or in the limitations of an estate intended to pass, all these acts, and others of the like nature, tending to establish a falle and fraudulent title to property, whether in the name of a real or fictitious person, are forgeries v: and there is hardly a case of this

y It is also a felony, without benefit of clergy, to make a falle entry in a marriage registers to alter it when made; to forge or counterfeit such entry, or a marriage licence, or to aid and abet such forgery; to utter the lame as true, knowing

kind, possible to be conceived and described, which hath not, in the course of the present century, been made a capital crime. The statutes for that purpose are innumerable; for, exclusive of many general provisions, it is become usual, upon the issuing of new bills of credit, lottery-orders, army-debentures, &c. to add a special clause of forgery relative to the subject then in question. Here, therefore, if any where, may be applied the observation, Pluit super populum laquens legum accumulatio.

§ 9. There is also a great variety of injuries against private property, which are in no degree fraudulent, but merely malicious; under this head the crime of Arson, which is capitally punished, is of the blackest dye, because destructive both of life and property. It hath, however, been thought expedient by the English legislature, to extend the same degree of severity to many mischiefs of very inferior criminality. Such are the offences,

knowing it to be counterfeit; or to destroy, or procure the destruction of, any register book of marriages, or any part of such register-book, with intent to avoid any marriage. 26 Geo. II. c. 33.5 16.

of persons destroying turnpike gates upon roads, or posts, rails, or other sence, or fences, belonging to fuch turnpike gates, or the fluices, flood-gates, or other works of navigable rivers; of persons cutting any hopbinds growing in a plantation of hops breaking down the head or mound of any fish-pond, whereby the fish are lost and destroyed'; killing, maining, or wounding any cattle; such also is the offence of wilfully and maliciously tearing, spoiling, cutting, burning, or defacing the garments or cloaths of any person or persons, which is in like manner made a felony, though within the benefit of clergy. If the legislature had not given repeated and deliberate proofs of a different fentiment, the punishment of death would feem by no means applicable to delinquencies which are merely in the nature of civil trespasses.

The second Stat. made in the 12th year of Q. Ann. c. 18. is less liable to exception.

^{*} Stat. 9 Geo. I. c. 22.

5 6 Geo. I. c. 23. which is intituled, "An act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons." The clause relative to cloaths in to be found in the last fection.

All persons making any hole in any vessel in diffress, or ficaling any pump of fuch vessel, or who shall wilfully do any thing tending to the immediate loss or destruction of such vessel, are thereby declared to be guilty of felony without benefit of clergy

breaking down the head or mound, of any ab bas floicoH A Pd KKINW , bang diff fireyed . killing, maining, or wounding any

of Crimes of postivoe Institution.

S 1. TVERY wanton, causeless, or unnecessary act of authority exerted by the legislature over the people, is tyran-nical, and unjustifiable; for every member of the flate is of right entitled to the highest possible degree of liberty, which is confiftent with the fafety and well-being of that states. trulpallies

With this observation I proceed to inflances from which this part of my subject will receive its easiest and best illustration.

Mens es arimus, et confilium, et sententia cimitaris po-fila est in legibus. Hoc fundamentum est libertatis qua fruimur; bit sons æquitatis. Legun denique ideires onnes servi sumus, ut liberi est possimus. Cic. Orat, pen Chaent,

In the year of Rome 671, L. Flaccus, being chosen Interrex, declared Sylla perpetual Dictator, ratified whatever he had done or thould do by a special law, and empowered him to put any citizen to death, without accusation, hearing, or trial. On this law Cicero made the following comment; "Omnium legum iniquissimam, dissimillimamque legis, eam esse arbitror: veruntamen babet excusationem, non enim videtur bominis lex esse, sod temporis."

When Lepidus celebrated his triumph over Spain, he commanded the whole Roman people to rejoice upon pain of Death; "Sacris et epulis dent onnes bane diem; qui secus fânit inter proferiptor effo." This proclamation must be considered in the nature of a temporary Law, and, as such, was both absurd and tyrannical.

The Decemvirs authorized creditors to cut in pieces the bodies of their infolvent debtors. One would wish to persuade one's felf, for the credit of humanity, that this was

"This condemnia has been been been been the thirt

A De Leg. Agrar, ili, c. 2. simile de

Water Mark to A. There were the

rooms to be con a san all and

only a figurative permission to divide the

The Emperdre, Accadius and Honorius, forbad upon pain of death all applications in favour of the guilty. They dittle confidered, how unworthily, the hand of Power is employed in closing the eyes of Justice against Mercy.

A man was capitally punished at Athens, for having killed a sparrow, which, to escape the pursuit of a hawk, had taken shelter in his bosom: And the Aseopagites put a boy to death, for having picked out the eyes of a little bird. The former case was thought a proof of a mind incorrigibly depraved; in the latter, "non videntur aliud judicasse, quam id signum esse periculosissima mentis, et multis malo futura, si adolevisses; "or, in the words of a more elegant writers, "il ne s'agit point là d'une condamnation pour crime, mais d'un juge-

Products authorited creditors

creditors, let his body be cut in pieces on the third marketday. It may be cut into more or fewer pieces with impunity: Or, if his creditors confent to it, let him be fold to foreigners beyond the Tiber."

f Quinctil. Inft, l. v. c. 9.

E L'Esprit des Loix, lev. C. 19.

ment de maurs dans une republique fande fur les maurs." Such might be the motives, but such motives are not of that urgent necessity, which can authorize a legislature to place the life of a man in competition with that of an infiguificant bird. It must be confessed indeed, that, by the laws of England, the malicious killing or wounding of any cattle is at this day capitally pumified. Dut severities so presonterous confound every idea of proportion between the chornity of crimes, and theresteen of their punishments.

It is a Law at Vehice, that those, who carry fire-arms about their persons, shall suffer death. This law is founded in apparent nithity, hevertheless it is contrary to the nature of things, to make the bare possible of the means of mischief equally penal with the most criminal use of those means. I have before observed, that it is high-reason by the law of England to have in possible in

i Charendas lege cavit, ut fi quit conciones cum ferro intraffet, continuo interficeretur. Interjecto deindo tempore, gladio accinctus, ex rure domum repetens, subitoindista concione, ficut erat in eam processit: ab eoque qui proxime conficerat, soluta a se legis sua monitus. "Idem ego illam inquit sanciam," ac stricto consessim gladio seipsum transsigit. Valet. Max. vi. 5. Diod. Sic. xii, 19.

reservation sagorquied tabers was an shur from motives are not of that the protective gamics

Flora mentions an ancient English law, which commanded every sperion converting matriage with a Jew to be burnt alive. The blood of a Christian family was supposed to be contaminated perhaps by such a contract; but it would be difficult to prove, that any human tribunal had a right to infift on such an expiation.

A law of the Viligoths compelled the Jows to sat every thing dreffed with pork but would not permit them to take the pork itself. In this we trace all the wanton cruelty of despotic enthuliasm.

k In the Chapter " of Crimes relative to Religion." I ought not to have omitted Sir Edw. Coke's argument for the afe of fire in taken of herefy. In the last of herefy is to be removed from the fociety of men, left he mount infect them, by the King's writ de leprofo amovendo: Jo be, that hath lepram anime, that is to be convicted of Herefy, that be out off, left he should poison others, by the King's win de brantice comburendo."

plemio accis. "at for rive domains , 510, in theting I deen

\$ 2. The pursuit of this subject might be amusing; but I return to the laws of England now in force, some of which I shall mention without any observations.

Every person shall forseit his goods and chattels, lands and tenements, to the King, and shall be imprisoned during life, who shall be convicted of having acted as a broker, or agent, in any plurious contract, where more than ten per cent. was taken a or, who shall obtain a patent for the monopoly of gan-powder a or who, being a counsellor, or other officer in the courts, shall practite without having taken the new oaths of allegiance and supremacy, and without subscribing the declaration against popery.

All persons shall be guilty of felony, who shall assemble armed to the number of three, for the purposes of smuggling , or, who shall serve a foreign state without taking the oath of allegiance ; or, who shall bring into the realm Gally-halfpence; or who shall

m 13 Eliz, c. 1000 D. S. Hill and C. 100 B. S. S. 13.

9 Jac. I. c. 4. § 18.

Transport

Transport

Transport

being watermen, shall take a greater number of passengers than are allowed, if any be drowned.

It is felony without benefit of clergy, to remain one month in the realm, being an Egyptian; or to be found in the fellowship of Egyptians; and Sir M. Hale takes notice, that thirteen persons were executed for this offence in one affize at Bury. It is equally capital, if any person shall wilfully break any tools used in the woodlen manufacture, not having the consent of the owner; or shall maliciously cut in pieces or destroy any manufacture of linen cloth of yarn, either when exposed to bleach, or dry; or shall wander, being a mariner, without the testimonial of justices; or shall knowingly receive, relieve, or maintain, Priests or Jesuits; or shall, during the term of transportation to the

to Geo. II. c. 31. § 9. (2010) have limited in this case the criminality is founded on the hypothesis of a casual event; in like manner it hath been adjudged treason to break a prison if any person be in durance under an accusation of treason, though the prison-breaker did not know that such person was imprisoned for any such offence. Hale's Hift. P. C. vol. ii. 141.

1 12 Geo. I. co 34. 20 1 10W 4 Geo. III. c. 37. \$ 16.

British

British colonies, voluntarily go into any part of the French or Spanish dominions, or shall be found in diffusie in the act of passing with prohibited or uncustomed goods, or shall forcibly hinder, obstruct, assault, oppose, or relist, any of the officers of the customs, or excise, in the seizure of any such goods.

It would be easy to collect considerable additions to this dismal catalogue; but the instances already given form a sufficient foundation for the following remark.

Composition and Promulgation of

S 3. Positive laws are those, which do not flow from the general obligations of morality, and the general condition of human nature; but have their reason and utility, in reference to the temporary advantage of that particular community for which they are enacted. Every law therefore, which comes under this description, ought to have a limited duration; and should not be suffered to remain a burthen upon the people, when the grievance, for which it was framed, hath ceased, and is forgotten.

20 Geo. II. c. 46. § 1. 19 Geo. II. c. 34-

X

The accumulation of fanguinary laws is the worst distemper of a State. Let it not be supposed, that the extirpation of mankind is the chief object of legislation. Nous lisons de quelques empereurs de Maroc, qui uniquement, pour faire parade de leur adresse, en se remestant en selle, la tête de leur ecuyer.

additions to the diffusi catalogue, but the instances already given form a lunicical four-

It would be easy to collect equilderable

dation for the following remark.

o noisinglumor and Promulation of the Committee and the content of the conten

In the course of this inquiry, I have attempted to state the original contract of society, the institution of penal restrictions, and the different effects of different penalties upon the sentiments of mankind: the nature also of criminality, the several species of crimes, and the particular degree of correction, to which, morally and politically, each crime ought to be subjected, have in their turn been considered.

But a Geo. If e and n. a to Can It of But

But these are the ground-works only of the system of government; the promulgation and execution of penal laws are the superstructure.

by the love of our country, sud is confe-Here then we discover new thatter for examination; too multifarious indeed, and too important, to be brought within the compass of the present design. I shall confine my attention therefore to the outlines only of this part of my subject, still anxious to establish the rights of humanity upon the principles of reason and benevolence; principles, applicable only to the legislation of those happy communities, where the good of all is the great object of all; and which bear no reference, either to that unnatural mode of government, which is known by the name of Despotism; or to those abused Aristocracies, which seek the gratification of a few in the defolation of many ... Passive obedience hath no principles. Man is not created to fubmit to the arbitrary caprice of creatures like himfelf: " It is ne-" ceffary to make a bad subject, in order to

sature of the courte, riol test triple Lence, extent, and populouters of the tributh and party and the courter of the courter

to § 2. On the promulgation of every new law, it should not escape the attention of the lawgiver, that public virtue is the love of the laws. For the love of the laws is followed by the love of our country, and is confequently productive both of recitade of conduct and purity of morals. Public virtue. thus defined, is the true end of government; But harfi and fanguinary laws have a tendency to check the attainment of this end! for they cannot be executed without railing the indignation of the funerer, and the abhorience of his fallowentrens vague and ufeless laws have the fame evil tendency. for it thay with truth be affirmed, that pub-Tic virtue bears a proportion to political free dom and that political freedom decreates in proportion to the uncertainty and multiplicity of penal laws. diselected to the the gratification of a few in the defoia

Pagiffretibut fed etiam ut est colans diligantque, prescribimus, ut Charondas in suis facit legibus." Cic. de Legibus, 4. 81. 26. 2.

d The ignorance of the people also diminishes in proportion to the increased freedom of the government.

e And therefore it rarely happens, that very flourishing States retain a great degree of liberty; for the laws necessarily bear a relation, not only to the principle and nature of the constitution, but to the opulence, extent, and populousness of the country.

and confequently to public virtue, what he man be compellable to do any thing, to which the laws of fociety do not compel him; or to abltain from any thing which the laws have not prohibited. Hence refute a general right to do with impunity any action, not prohibited by antecedent law; for every penalty must in its nature commence in future. Moneat Lex operiet, printiqual fertal, notes right one appoint, printiqual fertal, notes right and a power to alemonary such

tainted by the parliament of Norfolk was attainted by the parliament of forthaving known and concealed the vicious life of Catharine Howard before her marriage of the was attainted for a concealment, which, without the fpirit of vaticination, the rould not know to be eminimal. Her conduct had been in their impocent, their guilt was then first created by the legislature, and the was in fact punished for having eyes, cars, and a right daughter. Retrospective laws are generally unjust.

that the mandates and prohibitions of law be

yd

f Stat. 33 H. VIII. c. 21.

DOM

not extended to any action, not immoral in its nature, nor prejudicial to the well-being of fociety in its confequencements and ham

When the Russians resented the attempt of the Czar Peter to cut off their beards, their resentment did not arise from a belief, that Liberty consists in the privilege of being exempted from the rasor; but they misconceived the attempt to be sounded in the mere wantonness of power; and their reason, uncultivated as it was, informed them, that, in matters of indifference, unrestrained freedom is one of the indelible privileges of mankind.

When by Stat. Jac. I it was made felony for any person infected with the plague, to go abroad or converse with company; it was impossible to object to a severity, which, though fatal to individuals, was essential to the general safety of the people. But when in the eighteenth century it is made a capital crime to cut down a cherry-tree in an orchard; the thinking part of mankind must listen to such a law with irreverence and horror; for they know that the evil to be prevented is

by no means adequate to the violence of the Preventive, viscolo od awal oils sadt and

common underfranciance and faily notified Under this head it may be observed, that laws very severe in their nature, but originally not inconfishent with found policy, are fometimes suffered to retain their force, long after their subject-matter bath ceased to be of any consequence to the interests of society. Such for inftance, is that ftatutes, under which it is at this day a capital offence, to give corn. cattle, or other confideration, to the Scots for protection. It would be easy to produce many other instances equally exceptionable. And this is the necessary consequence of having given an unlimited existence to laws made for the correction of present evils. In the promulgation of such laws it should be observed that they are founded in the momentary exigencies of fociety, and refemble that necessity, which, in cases of extreme famine, obliges men to eat each other. They ceafe to eat men, in fuch cafes, as foon as bread can De obtained 4, one , date , date , widnes of Oppida moisi sieges sucider joses

bonce of nomely devices entitles, along

X 4

§ 5. It

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s Stat. 43 Eliz. c. 11.

It is further eliential to political free dom, that the laws be clearly obvious to common understandings, and fully notified to the people. laws very fevere in their name

Anciently the laws were composed in verse, which were frequently tung in public , that men thight remember them. The laws of the twelve tables were to well known, that, in the time of Cicero, children learnt them by heart in the first rudinients of their education At Athens the laws were written upon tables in large characters, and hung up in public places on the walls. The invention of printing, and the easy circulation of printed papers, have made these precauland, the effectual promulgation of the laws is much retarded by the manner in which they are formed. It was well observed by Lord

of Antat Probl. 5 19 & Hom. Ars Post 395 mildo

" Fuit hæc fapientia enondam 1901 100 Concubitu prohibere vago ; dare jura maritie o ed Oppida moliri ; leges incidere ligno. Sic bonor et nomen divinis vatibus, atque

k "Discebamus enim pueri duodecim tabulas, uc car-men necessarium, quas jam nemo discit." De Leg. ii. 23.

X4

Bacon.

Bacon, that the mandatory clause ought always to be placed at the beginning of the fature; yet those tedious presentates, which feels to have been derived from the ancient method of passing laws by petition, are still retained, though frequently villoconnected with the subsequent parts of the law, to which they are prefixed. When the laws are imperfectly known, they are feared, not loved. For, when the people first learn the law by fatal experience, they feel as if the Judge was in effect the Legislator; and as if life and liberty were fublected to arbitrary controut: the idea of infectivity is spread through the whole fociety; and the Tonle of fatery, in which polincal freedom is founded, ceales to exist. Upon the fame principle," the fame will be the confequences, where the law is imperfectly and indefinitely expressed. The stile therefore should be clear, and as concile as is confiftent with clearness; general terms alfo fould be particularly avoided, as liable to become the inftruments of oppression. Under the act 14 Geo. H. c. 6. stealing theep, " or other cattle," was made follow without benefit of clergy; but these general words, es or

10 22

" or other cattle," being confidered, as too vague to create a capital offence, the act was properly holden to extend only to theep. It may

have been derived from the ancient method \$ 6. It bath been faid, that the dread of evil operates more forcibly on the mind, than the expectation of good! a and therefore, that the fanction of laws must consist rather in penalties, than rewards . But it may be offered, perhaps, as a more obvious reason for the establishment of penalties, that obedience to the law is a matter of duty, demandable from the subject, and unnecessary to be purchased by the allurements of gifts and privileges, Be this as it may, every law must have both a directory and compulfory part , and without the latter will be imperfect . The wayward minds of the people must be deterred from disobedience by the frightful images of pain and infamy, slo ad blood everent shift

as is confillent with elearneis, general terms m Puffendorf, B. i. c. 6. 5 4.

m Which tother writers express by the word words. nulla deviantibus pana fancitun? Macrob I, ii. c. 17. penetic of clergy; but toole general words.

It is unfafe to leave the measure of corporal punishment indefinite; but when sharne only is the penalty, a greater latitude of expression is admissible. If the penal system were good, sharne would be the certain consequence of disobedience to law. The Valerian law was revived in the year of Rome 453, and was expressed in stronger terms than before:

"Siguis autem adversus ea secisse, nibil ultra, quam improbe factum, adject: id (qui tum pudor bominum erat) visum, credo, vinculum satis validum legis?" Diodorus Siculus a pretends to have preserved certain laws of Zalencus, in which the punishment of infamy is implied in a manner still imore indecisive,

"Let not a free woman, unless she be drunk, be attended by more than one servant."
Let her not go forth from the city in the night, unless when she goes to prositute berfelf to her Gallant. Let her not wear rich ornaments, or garments interwoven with gold, unless she be a courtesan."

P Liv. Hift. 1. x. c. 9. 9 Diod. Sic. I. zii. c. 29.

CHAR

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The historian cites other laws of the same kind; and observes, that they were attended by very beneficial effects;

It would be easy to pursue this subject to a very considerable length: I shall conclude however in the words of Lord Bacon :

Lex bong censeri possi, que si intimatione certa, præcepto susta, executione commoda, cum forma politiæ congrua, es generans vistutem in subditis."

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De Augm. Scient. L. viii. c. 3.

in a manner fill from a moleculary of the control of the contro

"Let not a free woman, und si she be drunk be artended by more than one servant."
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CHAP.

The

sie made; because those already existing are found inches and a This H is that errors of the most feed tendency are accomplated

whicego many centuries; a seatch, of which ei la Of the Execution of Penal Laws out

country is a firsting example, The English

\$ 1. COLON is recorded to have faid, that he had accomplished his syltem of laws, by coupling justice together with strength; by which he meant to imply that the legislative power would be of little avail without the affociated and effectual exertion of the executive. This idea may be extended; and one may affert, without the imputation either of cruelty or prelumption, that the strict execution of every unrepealed law is the part both of wisdom and of mercy,

It had better be laid, " perquam durum eft, " fed len ita fcripta eft;" than " len ita fcrip-" ta eft, fed non valebit." Cruel laws are fuffered to exist, because they are rarely enforced : for the fame reason they are diffegarded by the people; and laws more cruel legum latori cedero honeftum, argutias voro aflenius civis

Dan Bin et, auf Alen ornestaras. Plutarch. Vit. Solonis, angual and everin charactery a creation of the said and

are made, because those already existing are found ineffectual ". Thus it is, that errors of the most fatal tendency are accumulated through many centuries; a truth, of which the conduct of criminal profecutions in this country is a striking example. The English courts of judicature have long been eminent for the extraordinary wildom and probity of judges. Benevolence hath a natural prevalence in fuch characters; but benevolence ceases to be a virtue, when it induces them to forget that they are not authorized to interpret the penal laws; and that they are entrusted with the execution of them by a Legislature actually existing, and alone competent to fuch interpretation "

If Larceny, when amounting in common apprehension to the value of twelve-pence,

u A state so circumstanced may be described in the words of Tacirus, Antebac stagiciis laborasse, nunc legibus."

Tacit. Annal. l. iii. c. 25.

W This idea is very strongly inculcated in Diod. Sic.

L. xii. c. 16. Charondas illos, qui in criminalibus judiciis legia confilium non verba spectant, compescuit; ne cavillationibus auctoritatem legum labesactarent. Nam legum latori cedere honestum, argutias vero alicujus civis przvalere omnino absurdum, existimabat. A legis igitur præscripto, licet male admodum scripta esset, ut nullo medo discederatur, vetuit; corrigendi autem potestatem secit si qua correctione indigeret."

had regularly received the judgment of death according to law, a law to abfurd would not now exist; and Pilfering, destined to a more adequate, but certain correction, would no longer be encouraged by the confidence of impunity. Many inflances of a familiar kind have occurred in the course of this work.

course severity of the penal laws hard a ten-

or 45 In England, fays Montesquien to the ju-"rors determine, whether the person accu-"fed be guilty of the crime submitted to fisheir enquiry, if he be declared guilty, "the Judge pronounces the punishment inficted by the law on that particular offf fence; and for this purpole, it is only neff cellary for him to open his eyes The learned writer was only acquainted with the theory of English law. the migraft sufficient of which burnan facto-

- S 2. But let not these observations on the danger of impunity be misapplied; they relate merely to the strict conduct of tribunals in the course of prosecution and conviction; to that fixed, invariable administration of justice, which is best calculated to make the penal fystem respectable, God forbid, that I

redue des stareaments de cabai et le ishut

blook

fhould confound the duty of the judge, which is to be directed by the letter of the law, with that prerogative of pardon, which refides in the break of the supreme magistrate; and which, when properly lexerted, participates the best attribute of heaven & Yet it forms necessary to remark, that every dispropertionate severity of the penal laws hath a tendepey to familiatize the minds of princes to the exertion of this prerogative; and confequently to lead them in many cases to the abuse of it. When such inflances happen. the rightful fecurity of the people becomes a facilities to the fovereign. It hath been well faid, that " Clemency is a virtue which ought st rather to relide in the code of laws, than " in the private judgment wof any lindivi-" dual :" Yet we must sllow, that, even in the mildest systems of which human societies are capable, there will ftill exift a neceffity of this diferentiary power, founded in the possible circumstances of every conviction counte of profe coor and convenient

S ge Interest reipublica, ne delista sint impunita. But let not this consideration be suffered to induce an intemperate zeal, either

to that fixed, invariable administration of just-

in judges or profecutors, to punish the person accused, because a crime hath been committed. If the proof be doubtful, let the wretch be left, if guilty, to be his own punifher; let him be left to the centure of that internal tribunal, whose judgment is incapable of corruption, and whole terrors cannot be evaded by cunning, or collusion. curity intital volume

It is a political truth, that, when the laws are good, thofe, who deferve punishment, rarely escape the arm of Justice. to fille acculation wild or

" Cur tamen hos Tu Evalisse putes, quos diri conscia facti y Mens habet attonitos, et surdo verbere cædit, - Occultum quatiente animo tortore flagelfum? Pæna autem vehemens, ac multo fævior illis, Quas aut Cæditius gravis invenit, aut Rhadamanthus, Nocte dieque fuum gestare in pectore testem s."

The same idea is finely expressed by our own poets who feems to have pofferfed the fingular power of turning his genius to every train of ideas, of which the mind of man can be capable :

" Tremble, thou wretch That hast within thee undivulged crimes,
Unwhipt of justice: hide thee, thou bloody hand;
Thou perjurd, and thou simular of virtue, That art incestuous: Caitiff, to pieces shake, and That under covert and convenient feeming Haft practis'd on man's life!"

Juv. Sat, xili. ver. 193:

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\$ 4. The

man and content to reachly the perfect 5 4. The first step towards the punishment of offenders is their formal accusation. In all governments, which have any mixture of political freedom, this accusation should. as in England', be public. Private informers are the proper instruments only of despotic governments. Every idea of liberty and fecurity is loft, when the ends of justice are fuffered to be fought by fuch means. It is the part of wife and moderate Legislators, anxiously to preclude b every possible avenue to false accusation and calumny.

The state of the sound profes of 5 5. In

a The first depositions before the Magistrate are generally taken in the face of the country; and the find-ing of the indictment by the Jury is strictly in the nature of a public accusation; for the names of the Witnesses are indorfed on the Record, and fo delivered into the Court, that they may be publicly examined, and confronted with the prisoner in the course of the trial.

And here I shall digress in some measure from my subject, to observe, that, though the accusation transmitted to the Court is afterwards to be folemnly tried and determined; yet grand jurors should remember always, that it is their duty to confider fully the weight and cre-dibility of the evidence laid before them, and that they are not authorized to expose a fellow-citizen to the shame, expence, and danger of a public trial, upon the vague fuggestion of a mere probability.

b Yet it may be doubted, whether a wife and good writer did not use a very exceptionable, and dangerous latitude of expression, when he said that the salse accufer ought to fuffer the same punishment to which the person accused would have been exposed in case of con-

\$ 5. In the process subsequent to the first acculation, some delays are beneficial; (when Beccaria said otherwise, he consulted his own heart, and forgot the imperfections of mankind;) they are beneficial, because a certain interval is necessary between the crime alledged and the trial, that popular prejudices may fubfide into found reason; that judges may not be heated by the recent recollection of the fact; and that profecutors may rather feek the ends of justice, than the gratification of revenge. The enormity of the crime in question should be the measure of this interval. When the fact charged is very atrocious in its nature, a proportionable delay is requifite; not only, that the first passion of the people against the offence may evaporate; but that a sufficient time may be given for the preparation of proof on the part of the Public, and justification on the part of the Accused. Reason and the rights of humanity demand. that the strength and strictness of proof be increased in proportion to the enormity of

viction. " Ogni governo, e republicano, e monarchico, deve al calumniatore dare la pena, che toccherebbe all accusato." Dei Delitti, e delle Pene, § 16.

An affertion, which, if reduced to practice, would prove a fatal check to all criminal prosecutions!

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the crime in question. The more trivial delinquencies are less incredible in their nature, and less important in their consequences both to the Public and the Party; they are therefore proper for a more immediate discussion. But in neither case should the interval be so great as to destroy that promptitude of punishment, which is requisite to make the suffering of the offender the apparent consequence of his offence.

§ 6. I will not affirm that the fame diffinction should be our guide as to the infliction of punishment after trial and judgment. the crime be of an inferior nature, it feems. certain, that the punishment proportioned to it should be immediately inflicted. We ought in fuch cases to spare the corroding torment of expectation, which can neither tend to the private amendment of the criminal, nor be exemplary to his fellow-citizens; and to promote as much as possible that useful affociation of ideas, which may check the frailty of the people, by holding out the image of unavoidable and immediate punishment. The impression of terror diminishes in proportion to the distance of the object. Leginary strong formation the consequence for the a

But how far it may be proper to allow a longer interval, when a capital judgment is the confequence of conviction, is a question, on which it is difficult to reconcile the language of political utility to that of religion. The immediate execution of the criminal may possibly give a more falutary shock to the sentiments of his fellow citizens, than the same horrid spectacle can produce, when the circumstances of the crime are in some degree saded on the memory, and when compassion hath taken the place of indignation. Yet what are the feelings of a serious mind at the sight of a fellow-creature thus cut off,

with a parast of viscous who six will the

§ 7. There are certain possible contingencies relative to the criminal, which should in all governments be admitted as good reasons in stay of execution. Of this kind is the plea of infanity; in regard to which,

[&]quot; With all his crimes broad blown, as flufh as May;

[&]quot; And, how his audit stands, who knows, fave heaven;

[&]quot; But in our circumstance, and course of thought,

[&]quot;Tis heavy with him c."

c Shakespear, Hamlet.

the benevolence of the English law hath been already mentioned. The plea of pregnancy is entitled to a fimilar indulgence, though not admitted to operate fo absolutely in our law, as in the law of Egypt d, and of ancient Rome . " If a woman (fay the writers of the English law () hath once had the benefit of this reprieve, and been delivered and afterward become pregnant again, she shall not be entitled to the benefit of a further respite for this cause." Such is the doctrine of our law, and use hath taught us to read it with tranquility and indifference; though in truth no reason can be given as to the first reprive, which will not apply equally to the fecond.

leticely recognition,

2 7

d The reasons for this indulgence are clearly and fully flated in Diod. Sicul, I, i. c, 77.

e ff. xlviii, 19. 8.

f "And when a woman commits high-treason, and is quick with child, she cannot upon her arraignment plead it, but she must either plead "Not Guilty," or confess the charge. She cannot alledge it in arrest of judgment, but judgment shall be given against her; and if it be found by an inquest of matrons, that she is quick with child, (for privement enceint will not serve) it shall arrest and respite execution till she be delivered; but she shall have the benefit of that but once, though she be again quick with child." Co. 3 Inst. p. 17.

§ 8. By the laws of the Romans 8 the Executioner was forbidden, not only to appear in the Forum, but even to have any habitation in the City; and this was enacted, that the minds of the people might not be familiarized to the Idea of capital executions. Upon the fame principle, it was not unufual to put the Malefactor to death in a fecret dungeon, which was called Tullianum. It feems more advisable however, on many accounts, that the punishment of death should in every instance be publicly inflicted; and it is a certain proof of some defect in the mode of infliction, when it ceases to be considered as the most solemn and affecting scene that can be exhibited. in a firm it will though marrie

sensite that yellown Henri has the maactions are a 120 Exhaust the violet see the water the color word is properly to the color evenuelly and the world the shalls ment tinked that southerselve out the terms

Y4. CHAP.

g " Carnificem non modo foro, fed etiam coelo hoc ac. spiritu, censoriæ leges, atque urbis domicilio carere voluerunt," Cic. Orat, pro Rab, c. 5. All he property is their sen-

CHAP. XXIII.

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Of the Importance of this Subject.

T cannot have escaped the notice of my readers, that the ideas, which in the course of this inquiry I have endeavoured to establish as principles of penal law, have not been stated as abstract propositions; but rather as argumentative inferences, interwoven with, and to be collected from, observations on the penal fystems of different governments. My attention hath at the same time been most particularly turned to the English code of laws; and many melancholy instances have concurred to shew that the reformation of that code is become an important and almost necessary work. I know. that many will conceive fuch a reformation to be impracticable; I know, that the minds of fome will ftartle at the idea of innovations; I know, that others will shrink from the supposed difficulty :- Yet I am convinced, that

that the undertaking is neither impracticable, unfafe, nor difficult b.

Under this conviction it hath been my object, by frequent appeals to reason and benevolence, to engage those sensible and good minds, which are ever ready to sympathize with him who pleads the cause of humanity. To excite the attention of that more numerical sensitives are successful.

h The British Constitution is the pride of every Briton: to secure, to fortify, to perpetuate the excellent system of government, is the business of every Briton. It may be pardonable therefore in me to point out, what I conceive to be the best method of accomplishing the reformation in question; leaving the execution of that method, or the adoption of a better plan, to those who lie under the more immediate engagements both of interest and duty.

The learned observer on the Ancient Statutes was certainly well founded in suggesting that a reformation of the English Law can never be effectually carried on, without the affistance of able Lawyers, not members of the Legislature. With such affistance, it might perhaps be easy to frame separate declaratory statutes relative to each class of crimes, comprehending all the descriptions and degrees of each crime, with their proportionate punishments. Every such declaratory statute should be attended by a supplemental Bill, repealing all prior provisions relative to the class of crimes in that statute contained. It seems superstuous to point out the many collateral good effects, which might arise from this method of seeking the end proposed.

The repeal of particular flatutes, without such prepasatory caution, will be found a mere palliative remedy; which may tend indeed to abate the symptoms of the disease, but from which a radical cure cannot be expected.

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CHAP. XXIII.

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a Talka

rous class of men, who are diffracted by the cares, heated by the action, or diffipated by the pleasures of the world, may be wished, but is not to be expected: though nothing is more certain than that the subject of these enquiries deserves the attention of every man amongst us. " For no rank, no elevation " in life, no conduct how circumspect soever, " ought to induce any reasonable man to " conclude, that the penal fystem doth not, " nor possibly can concern him!" A very flight reflection, on the numberless unforefeen events which a day may bring forth, will be fufficient to shew that we are all liable to the imputation of guilt; and confequently all interested, not only in the protection of innocence, but in the affignment to every particular offence, of the smallest punishment compatible with the safety of fociety.

It must ever happen, that many private members of the state will regard the imperfections of the laws with indifference till they experience their effects. What in such men must be attributed to inability or neglect

i Foster's Crown Law, Pref. p. 3.

only, may in others, perhaps deserve the appellation of a breach of trust. Be this as it may; it highly concerns the safety of every individual, as well as the general morality and happiness of the people, that the innocent be protected against unmerited severities, and that the guilty be conducted with certainty to punishments proportionate to their crimes.

These Ends can be attained only when the penal system is good. Under such a system, they who offend against the Laws, and they only, have reason to fear: whilst those happier members of society, who deserve security, enjoy it in the full persection to which the rectitude of their conduct hath entitled them.

THE END.

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